FILED
99 792 NOV 5 - 1999

No. 99—

IN THE
Supreme Court of the United States

NVR HOMES, INC.,
Petitioner,
v.
CLERKS OF THE CIRCUIT COURTS FOR ANNE ARUNDEL COUNTY, MARYLAND, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether proceedings in a bankruptcy court seeking interpretation of a confirmed plan of reorganization constitute a "suit * * * against one of the United States" under the Eleventh Amendment, where state authorities were not compelled to participate and where the debtor sought no coercive relief against the states.

2. Whether the Fourth Circuit below erred in concluding—in conflict with the Second Circuit's decision in the leading case of *City of New York* v. *Jacoby-Bender, Inc. (In re Jacoby-Bender, Inc.)*, 758 F.2d 840 (2d Cir. 1985), and the many decisions following it—that transfers occurring prior to confirmation of a bankruptcy plan are not exempt from taxes under 11 U.S.C. § 1146(c).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner NVR Homes, Inc. was the appellee in the Fourth Circuit. At the time the proceedings below were initiated, NVR Homes was a wholly-owned subsidiary of NVR, Inc., a publicly held company whose shares are traded on the American Stock Exchange. Effective September 30, 1998, NVR Homes was merged into NVR, Inc. NVR, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of NVR, Inc.'s stock.

Respondents Clerks of the Circuit Courts for Anne Arundel County, Clerks of the Circuit Courts for Baltimore, Clerks of the Circuit Courts for Carroll County, Clerks of the Circuit Courts for Frederick County, Clerks of the Circuit Courts for Harford County, Clerks of the Circuit Courts for Howard County, Clerks of the Circuit Courts for Montgomery County, Clerks of the Circuit Courts for Prince George's County, Clerks of the Circuit Courts for Washington County, Franklin Park Borough, Hampton Township, Hampton Township School District, Seneca Valley School District, Moon Area School District, North Allegheny School District, Shaler Area School District, and Commonwealth of Pennsylvania were appellants in the Fourth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner NVR Homes, Inc. ("NVR") respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The corrected opinion of the Fourth Circuit is reported at 189 F.3d 442 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Eastern District of Virginia is reported at 222 B.R. 514 and reproduced at App. 40a. The Bankruptcy Court for the Eastern District of Virginia issued two pertinent opinions. The first is unreported and reproduced at App. 100a; the second is reported at 206 B.R. 831 and reproduced at App. 57a.

JURISDICTION

The judgment of the Fourth Circuit was issued on July 12, 1999, and the court issued a corrected opinion on

August 16, 1999. App. 1a. The Fourth Circuit denied timely petitions for rehearing and suggestions for rehearing en banc filed by petitioner and respondents on August 10, 1999. App. 34a. The jurisdiction of the Fourth Circuit was based on 28 U.S.C. § 158(d). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Pursuant to Supreme Court Rule 29.4(b), petitioner states that 28 U.S.C. § 2403(a) may apply in that the constitutionality of 11 U.S.C. § 106 is drawn into question and neither the United States nor any federal department, office, agency, officers, or employee is a party.[1] The notification required by Rule 29.4(b) has been made. The Fourth Circuit did not certify to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution and 11 U.S.C. §§ 106(a) and 1146(c) are reproduced at App. 121a.

INTRODUCTION

This case presents important questions—on which the lower courts are divided—affecting the administration of thousands of bankruptcy proceedings every year in which state entities, particularly taxing authorities, have direct interests.

In service of the organizing principle of bankruptcy that all claims against the estate should be resolved collectively, Congress has attempted to ensure the states' full

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1 Although the United States intervened in the bankruptcy court to defend the constitutionality of 11 U.S.C. § 106(a), it did not appear in the district court or the court of appeals, and therefore was not a "part[y] to the proceeding in the court whose judgment is sought to be reviewed" and is not a party here under S. Ct. Rule 12.6.

participation by abrogating the states' sovereign immunity in a wide variety of bankruptcy proceedings. 11 U.S.C. § 106. This Court's recent Eleventh Amendment decisions, however, have thrown the validity of that abrogation into doubt. Thus, the lower courts are increasingly required to consider which of the wide variety of bankruptcy proceedings implicating a state's interests constitute "suits" against the state within the meaning of the Eleventh Amendment. The Fourth Circuit's decision below found that NVR's attempt to secure a declaration of the meaning of its confirmed plan of reorganization—in which the state was not served with process or otherwise compelled to appear—constituted a "suit" and was barred by the Eleventh Amendment. This holding conflicts with decisions of other courts on this important and recurring issue, and merits this Court's review.

This case also presents an important statutory question that has divided the lower courts. In 11 U.S.C. §1146(c), Congress provided tax relief to debtors—relief that is often critical in permitting a business to restructure its finances "so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 595 at 220 (1977). In conflict with other decisions, however, the Fourth Circuit held that such relief was unavailable with respect to pre-confirmation tax payments made in connection with property transfers in the ordinary course of business, despite the acknowledged fact that the pre-confirmation transfers were necessary to the consummation of the reorganization plan. This holding not only conflicts with other decisions but constitutes a serious threat to the successful reorganizations Congress envisioned when it adopted 11 U.S.C. § 1146(c).

This Court has recognized the need to grant review where the issues presented affect the administration of bankruptcy. *See, e.g., Reading Co.* v. *Brown*, 391 U.S.

471, 475 (1968) ("We granted certiorari * * * because the issue is important in the administration of the bankruptcy laws and is one of first impression in this Court."); *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 418 (1968) ("We granted certiorari * * * because this case presents important questions under the bankruptcy laws."). The issues here not only affect the administration of thousands of bankruptcy cases, but also have divided the lower courts. The Court should grant certiorari to resolve both questions presented.

STATEMENT OF THE CASE

1. The NVR Bankruptcy. NVR is a leading homebuilder in the Washington, D.C. metropolitan area. In the late 1980s and early 1990s, conditions in the residential real estate market worsened considerably, and NVR began experiencing declining operating margins, which in turn made it difficult for NVR to meet its debt service obligations. On April 6, 1992, NVR sought protection under Chapter 11 of the Bankruptcy Code.

NVR filed "first day" motions seeking authority from the bankruptcy court to continue operations in the ordinary course. Included among the motions granted were those authorizing NVR, as debtor in possession, to sell properties free and clear of liens. App. 41a. The courts below found that these orders permitting "the purchase of lots and the sale of lots and finished homes" were "essential to the formulation, confirmation and consummation of the Confirmed Plan and to Debtors' effective reorganization and emergence from bankruptcy." App. 101a. It was only the company's ability to continue to conduct its homebuilding operations that protected the value of the company as a going concern and avoided liquidation. Ct. App. J.A. 270. From the time these orders were entered until NVR emerged from bankruptcy on September 30, 1993, NVR made 5,571 transfers of real property and

paid $8,349,103 in transfer and recordation taxes to state and local taxing authorities. App. 8a-9a.

After extensive negotiations with its creditors, NVR submitted a Second Amended Joint Plan of Reorganization ("Joint Plan"), as modified, on July 21, 1993, and the bankruptcy court approved the Joint Plan the next day. With respect to the tax payments at issue in this case, the Joint Plan provided:

> Pursuant to section 1146(c) of the Bankruptcy Code, the issuance, transfer or exchange of securities pursuant to the Plan and the transfer of, or creation of any lien on, any property of any Debtor under, in furtherance of, or in connection with the Plan shall not be subject to any stamp tax, real estate transfer tax, recordation tax, or similar tax. [Ct. App. J.A. 43.[2]]

The bankruptcy court's order confirming the plan repeated this language essentially verbatim. Ct. App. J.A. 106.

As the district court observed, respondents "were served with copies of the proposed Plan and related papers because they were creditors of the estate * * *. None of the [respondents] objected to the Plan, and, after the July 22, 1993 order confirming the Plan, none appealed, as they might have, to the district court." App. 43a-44a (footnote omitted). The Joint Plan was fully implemented by September 30, 1993, and NVR emerged from bankruptcy. App. 44a.

In light of the Plan's provision exempting NVR from paying transfer or recordation taxes, NVR sought refunds from various jurisdictions to which it had paid taxes in the ordinary course of business under the first day orders. While taxing authorities in Virginia, New York, Dela-

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[2] Section 1146(c) provides: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under Section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax."

ware, and North Carolina refunded to NVR all such taxes they had collected in the post-petition, pre-confirmation period—approximately $1.2 million, App. 44a n.6—the taxing authorities in Maryland and Pennsylvania—respondents here—refused NVR's requests for refunds. *Id.*

2. Proceedings Below. NVR filed a motion under Bankruptcy Rule 9014 [3] seeking a declaratory judgment "to establish that the transfers of real property made by the Debtors during the pendency of these Chapter 11 cases, from April 6, 1992, the filing date, through September 30, 1993, the effective date [of the Joint Plan] were exempt from transfer and recordation taxes pursuant to 11 U.S.C. § 1146(c)." Ct. App. J.A. 14. NVR's motion did not seek any payment or refund from the taxing authorities, as NVR might have sought in an adversary proceeding under 11 U.S.C. § 505, but instead sought only an interpretation by the bankruptcy court of its own confirmation order, in accordance with its retained jurisdiction under 11 U.S.C. § 1142, Bankruptcy Rule 3020(d), and the order itself. Notice of the motion was served on the taxing authorities, which responded by filing motions for abstention, dismissal, or summary judgment. App. 45a.

In an order entered March 25, 1996 (and re-entered April 4, 1996), the bankruptcy court found that

> the pre-confirmation transfers at issue here, that is, the purchase and sale of lots and the sale of lots and finished homes, were essential to the formulation, confirmation and consummation of the Confirmed Plan and to Debtors' effective reorganization and emergence from bankruptcy, and thus fall within the

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[3] Bankruptcy Rule 9014 provides in part: "In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to the motion."

> tax exemption of 11 U.S.C. § 1146 as interpreted by the authorities. [App. 101a-102a.]

The court therefore declared that the transactions were exempt from transfer and recordation taxes. App. 102a.

Respondents moved for reconsideration in light of *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 55 (1996), contending that the abrogation of sovereign immunity found in 11 U.S.C. § 106 was unconstitutional.[4] The United States was granted leave to intervene "for the purpose of defending the constitutionality of 11 U.S.C. § 106(a)." Motion of the United States for Leave to Intervene Pursuant to 28 U.S.C. § 2403(a) (Dec. 2, 1996). It urged that the statutory abrogation of sovereign immunity was constitutional as an exercise of Congress's power under § 5 of the Fourteenth Amendment and under the Bankruptcy Clause, Art. I, § 8, cl. 4.

The bankruptcy court disagreed. The court found that, in adopting § 106, Congress relied on the Bankruptcy Clause, and not on § 5 of the Fourteenth Amendment, App. 69a-78a, and held that, under *Seminole Tribe*, "§ 106 is unconstitutional to the extent that Congress purported to employ it as a means by which to abrogate the several states' immunity under the Eleventh Amendment." App. 77a-78a.

The court also rejected NVR's argument that its motion did not constitute a "suit" within the meaning of the Eleventh Amendment. App. 78a-80a. It did find, however, that the Eleventh Amendment immunity extended only to the Commonwealth of Pennsylvania—not the Pennsylvania townships and school districts—and to the clerks of the

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[4] Section 106(a), which is set forth in full at App. 121a-122a, was adopted by Congress in 1994 after this Court held that previous efforts to abrogate sovereign immunity were not sufficiently clear to achieve that end. *See United States* v. *Nordic Village, Inc.*, 503 U.S. 20 (1992); *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989).

circuit courts in Maryland only to the extent they collected transfer taxes on behalf of the state. App. 82a-89a.

Both NVR and respondents appealed to the district court. Turning first to the statutory issue, the district court held that "the transfers plainly fall 'under [the] plan confirmed' " as required by § 1146(c), because they were essential to the formulation, confirmation, and consummation of the plan. App. 48a. Addressing specifically the question whether transactions occurring before confirmation could be "under a plan confirmed," the court held that "[a]n affirmative answer to this question follows from the Plan itself, which includes no temporal limitations on covered transactions, and from the practicalities of the situation." App. 49a. The court observed:

> [R]eorganization plans often concern or contemplate transactions that occur prior to the plan's confirmation. Thus, in the typical Chapter 11 case * * * the development, submission, and confirmation of a plan of reorganization is a process that is not usually completed until some time after the filing of the petition, during which period of time the debtor continues to operate. And it is often true that business conducted during this post-petition, pre-confirmation period is essential to the success of both the plan of reorganization and the debtor's emergence from bankruptcy. Precisely this occurred here. [App. 49a].

While endorsing the bankruptcy court's holding on the statutory question, the district court reversed the determination that NVR's motion was a "suit" within the meaning of the Eleventh Amendment. The court held that "the proceeding lacked the fundamental attributes that commonly define a 'suit,' " because, among other things, "none of the Taxing Authorities were named as defendants, nor were they served with process mandating that they appear in a federal court." App. 51a.

Respondents appealed to the Fourth Circuit, which reached yet a different result from either of the two courts below. The court of appeals observed that its decision in *Schlossberg* v. *Maryland (In re Creative Goldsmiths)*, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998), had held that the express abrogation of sovereign immunity in the Bankruptcy Code exceeded Congress's authority. App. 13a. "This holding [does] not end the matter, however, because the Eleventh Amendment does not reach every variety of judicial proceeding." *Id.* Noting that it had in recent decisions "distinguished the exercise of a federal court's jurisdiction to dispose of a debtor's estate from a suit against a state," App. 15a,[5] the court of appeals examined whether the proceedings here constituted a "suit" against the state taxing authorities.

Reviewing what it determined to be the "crucial characteristics" of the proceeding—"*i.e.*, the coercion exercised against the states, whether the resolution required federal jurisdiction over the state, and the substance of the remedy sought," App. 18a—the court concluded "that this bankruptcy court proceeding was indeed a suit prosecuted against Maryland and Pennsylvania." *Id.* It recognized that the procedural posture of NVR's motion was not coercive in that the bankruptcy court issued no summons to the taxing authorities, but found that the "ultimate resolution of the dispute between NVR and the states does require * * * that the federal courts exercise jurisdiction over the states." App. 19a. Otherwise, the court believed, no effective remedy could be granted. App. 19a-20a. Because it determined that the ultimate remedy sought by NVR was payment of money from the states, a characteristic closely identified with the "quintessential 'suit' under

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[5] Citing *Virginia* v. *Collins (In re Collins)*, 173 F.3d 924 (4th Cir. 1999), *pet. for cert. filed*, 68 U.S.L.W. 3153 (U.S. Aug. 31, 1999) (No. 99-380); *Maryland* v. *Antonelli Creditors' Liquidating Trust*, 123 F.3d 777 (4th Cir. 1997); *Schlossberg* v. *Maryland*, *supra*.

the Eleventh Amendment," App. 21a, the court held that the claims against the states were barred by the Eleventh Amendment.

The court then considered whether NVR's remaining claims were viable under 11 U.S.C. § 1146(c), and determined, contrary to both courts below, that they were not. Recognizing that the view adopted by the lower courts "has enjoyed some acceptance by other courts," App. 24a—particularly those relying on the Second Circuit's decision in *City of New York* v. *Jacoby-Bender, Inc. (In re Jacoby-Bender, Inc.)*, 758 F.2d 840 (2d Cir. 1985)—the Fourth Circuit went to great lengths to attempt to distinguish those cases. Specifically, it reasoned that the test of *Jacoby-Bender*, which sought to determine whether the transfers at issue were necessary to consummation of a plan, was inapplicable to transfers occurring prior to confirmation of the plan. Because the NVR transfers at issue did not occur *after* the confirmation of the Joint Plan, the court held that they were not made "under a Plan confirmed." App. 27a. Instead, the court concluded that "Congress, by its plain language, intended to provide exemptions only to those transfers reviewed and confirmed by the court." App. 30a.

Chief Judge Wilkinson took issue with the majority's conclusion that its understanding of § 1146(c) was compelled by the plain language of the statute. App. 31a. In his view, "[i]t is not plain * * * that section 1146(c) contains a temporal element." *Id.* Instead, "the fact rather than the timing of plan confirmation is the critical issue." *Id.* He found it "far from obvious" that § 1146(c) excluded transfers made, for example, "[i]n a complicated reorganization [where] a debtor-in-possession may operate for some time pursuant to the terms of an unconfirmed plan while it negotiates with its creditors." App. 32a. Chief Judge Wilkinson also concluded that "reading the phrase to require only that the plan ultimately be con-

firmed would comport with a central purpose of our bankruptcy laws: 'permitting business debtors to reorganize and restructure their debts in order to revive the debtors' businesses and thereby preserve jobs and protect investors.' " *Id.* (quoting *Toibb* v. *Radloff*, 501 U.S. 157, 163 (1991)). He nevertheless concurred in the majority's holding on the ground that "concerns of federalism require the narrower interpretation" adopted by the majority. App. 33a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT REVIEW TO CONSIDER WHETHER PROCEEDINGS CONDUCTED BY A BANKRUPTCY COURT CONSTITUTE "SUITS" AGAINST A STATE

A. There Is Uncertainty About The Reach Of This Court's Eleventh Amendment Decisions In The Bankruptcy Context

In response to this Court's decisions in *Nordic Village*, *supra*, and *Hoffman*, *supra*, Congress amended 11 U.S.C. § 106(a) to make clear its intention to abrogate state sovereign immunity with respect to actions under specified sections of the Act, including 11 U.S.C. § 1146. There is no dispute that the amendments to § 106(a) " 'unequivocally expresse[d] [Congress's] intent to abrogate the immunity.' " *Seminole*, 517 U.S. at 55 (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)). *See* Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 Iowa L. Rev. 767, 821 (1998).

NVR's efforts below to obtain clarification of its obligations to the state taxing authorities were therefore valid if either (a) "Congress * * * acted 'pursuant to a valid exercise of power' " when it adopted § 106, *Seminole*, 517 U.S. at 55 (quoting *Green*, 474 U.S. at 68), or (b) those proceedings did not constitute a "suit in law or equity, commenced or prosecuted against one of the United States" within the meaning of the Eleventh Amendment.

These questions have been the subject of extensive consideration in the lower courts [6] and in academic commentary.[7] In many cases each year, "the Bankruptcy Code's provisions concerning discharge, avoidance of preferences, avoidance of fraudulent transfers, turnover of property of the estate, protection against discriminatory treatment, the automatic stay, and the determination of tax liability" are at issue in bankruptcy proceedings involving state authorities. Note, *supra*, 112 Harv. L. Rev. at 1767 (footnotes omitted). As one commentator has observed, "[s]tates and state agencies are often major players in bankruptcy cases," whose continued participation is called into question by this Court's recent Eleventh Amendment decisions. Lieb, *supra*, 7 Am. Bankr. Inst. L. Rev. at 279. "Until the Supreme Court provides answers to these questions, bankruptcy litigation will be complicated and cause uncertainties in cases in which a state is a party in interest." *Id.* at 282.

This case provides the Court with an opportunity to resolve the constitutional validity of 11 U.S.C. § 106(a). We recognize, however, that there appears to be little room under this Court's decision in *Seminole Tribe*

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[6] In addition to the Fourth Circuit's decisions cited above, *see, e.g., Sacred Heart Hosp. of Norristown* v. *Pennsylvania (In re Sacred Heart Hosp. of Norristown)*, 133 F.3d 237 (3d Cir. 1998); *Department of Transp. & Dev.* v. *PNL Asset Management Co. (In re Estate of Fernandez)*, 123 F.3d 241 (5th Cir.), *amended by* 130 F.3d 1138 (1997); *United States* v. *Nebraska (In re Doiel)*, 228 B.R. 439 (D.S.D. 1998); *DeAngelis* v. *Laskey (In re DeAngelis)*, —— B.R. ——, 1999 WL 781620 (Bankr. D. Mass. Sept. 28, 1999).

[7] *See, e.g.*, Note, *Reconceptualizing the Role of Constructive Waiver After* Seminole, 112 Harv. L. Rev. 1759 (1999); Ned W. Waxman & David C. Christian, *Federal Powers after* Seminole Tribe: *Constitutionally Bankrupt*, 47 Drake L. Rev. 467 (1999); Comment, *Obtaining Jurisdiction Over States in Bankruptcy Proceedings After* Seminole Tribe, 65 U. Chi. L. Rev. 911 (1998); Richard Lieb, *Eleventh Amendment Immunity of a State in Bankruptcy Cases: A New Jurisprudential Approach*, 7 Am. Bankr. Inst. L. Rev. 269 (1998).

for the argument that Congress could rely on its Article I power "[t]o establish * * * uniform Laws on the subject of Bankruptcy throughout the United States" as the source of authority to abrogate state sovereign immunity—no matter what evidence could be mustered in support of the argument that the unique concerns underlying, and the history of, the bankruptcy power should be given special quarter.[8] *See Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 119 S. Ct. 2199, 2205 (1999) ("*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers").[9]

Debtors seeking to secure the participation of the states in bankruptcy proceedings—which Congress indisputably envisioned—have therefore defended the abrogation of sovereign immunity on the ground that the exercise of con-

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[8] One element of such an argument would include the recognition that, unlike other Article I powers, "traditionally in the Anglo-American legal system, bankruptcy has been administered by the courts." 1 *Norton Bankruptcy Law & Practice 2d* § 4:8, at 4-43 (1997). *See also id.* § 1:4, at 1-10 ("In the exercise of its constitutionally derived authority on the subject of bankruptcies, Congress always has dealt with the subject as a juridical one"). Thus, it is safe to conclude that the states, in ratifying the Constitution, were aware that the authority to legislate on the subject of bankruptcies was—like Article III—a grant of *judicial* authority to the federal government. Couple to that a recognition that a bankruptcy proceeding can be effective only if it reaches all creditors with a claim on the estate, as well as the recognition by this Court in cases such as *Van Huffel* v. *Harkelrode*, 284 U.S. 225, 228 (1931), that bankruptcy courts had inherent power—even absent a statute—to sell property free and clear of state tax liens because "[r]ealization upon the lien created by the state law must yield to the requirements of bankruptcy administration," and the argument that the states necessarily waived their immunity to suit in conferring the bankruptcy power on the federal government becomes compelling.

[9] *See also Hoffman*, 492 U.S. at 105 (O'Connor, J., concurring) ("Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause"); *id.* (Scalia, J., concurring in the judgment) (same).

gressional power reflected in § 106(a) is grounded in § 5 of the Fourteenth Amendment. In support of such efforts, the United States has regularly intervened in bankruptcy proceedings—as it did here—to defend the constitutionality of § 106(a) as an exercise of Congress's power under § 5. *See, e.g., Schlossberg*, 119 F.3d at 1146. The lower courts, however, have largely rejected such arguments.[10]

The Court's most recent Eleventh Amendment cases, including *College Savings Bank, supra,* did not definitively resolve the question of congressional authority in the unique bankruptcy context. Indeed, the Eighth Circuit recently observed that "bankruptcy has long been considered a special area of the law, and the Supreme Court's June 1999 rulings on sovereign immunity have not resolved how far Congressional power extends in the bankruptcy context." *Rose* v. *United States Dep't of Educ. (In re Rose)*, 187 F.3d 926, 930 n.8 (8th Cir. 1999).

In an appropriate case, therefore, this Court should take the oportunity to resolve that question, and it could well use this case to do so. As we explain below, however, this case presents a preliminary question independently meriting this Court's review, the resolution of which could postpone the need to consider the constitutionality of § 106(a): whether the proceedings below were "suit[s]

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[10] *See, e.g., Sacred Heart Hosp.*, 133 F.3d at 243-245; *Department of Transp. & Dev.*, 123 F.3d at 245; *Schlossberg*, 119 F.3d at 1146-47; *Franchise Tax Bd.* v. *Lapin (In re Lapin)*, 226 B.R. 637, 643-644 (B.A.P. 9th Cir. 1998); *In re DeAngelis*, 1999 WL 781620, at *2-*3; *Quesada* v. *Puerto Rico Dep't of Health (In re Arecibo Community Health Care, Inc.)*, 233 B.R. 625, 628-629 (D.P.R. 1999); *In re Doiel*, 228 B.R. at 444-449. *But see Wyoming Dep't of Transp.* v. *Straight (In re Straight)*, 209 B.R. 540 (D. Wyo. 1997), *aff'd on other grounds*, 143 F.3d 1387 (10th Cir.), *cert. denied*, 119 S. Ct. 446 (1998); *Headrick* v. *Georgia (In re Headrick)*, 200 B.R. 963 (Bankr. S.D. Ga. 1996), *aff'd on other grounds*, 146 F.3d 1313 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 2410 (1999); *Mather* v. *Oklahoma Employment Sec. Comm'n (In re Southern Star Foods, Inc.)*, 190 B.R. 419 (Bankr. E.D. Okla. 1995).

* * * against one of the United States" within the meaning of the Eleventh Amendment.

B. The Lower Courts Are Divided On The Issue Of What Types Of Bankruptcy Proceedings Constitute "Suits" Under The Eleventh Amendment

Bankruptcy proceedings are unique. As the taxing authorities themselves recognized below, "[w]hereas suits in other federal courts generally fall into fairly recognizable procedural formats—an initial complaint and summons, answer, counterclaim or joinder of third party—bankruptcy cases employ a wide variety of procedural mechanisms, many of them based upon the practicalities of administering large volumes of cases in an efficient manner." Fourth Circuit Br. at 37. Bankruptcy cases may be initiated a variety of ways, and the proceedings which follow often bear little resemblance to the sort of commonplace civil litigation within the purview of the Eleventh Amendment's application to "any suit in law or equity." [11]

In the wake of this Court's decisions delimiting the sources of congressional authority to abrogate Eleventh Amendment immunity—and the consequent conclusion of many lower courts that § 106(a) is unconstitutional—the lower federal courts have increasingly been required to consider which of the many different bankruptcy proceedings in which states might participate constitute "suits" for Eleventh Amendment purposes. The conflicting results reached by those courts demonstrate the need for guidance from this Court.

There seems to be little dispute that *adversary* proceedings against the states are suits within the meaning of the Eleventh Amendment. In *Schlossberg*, for example, the

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[11] *See* Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an in Rem Model of Bankruptcy Jurisdiction*, 15 Bankr. Dev. J. 261, 261-262 (1999); Kristin D. Kiehn, *Jurisprudence and Jurisdiction: Toward a More Flexible Approach to Bankruptcy Interlocutory Appeals*, 67 Fordham L. Rev. 3261, 3273 (1999).

Fourth Circuit assumed that an adversary proceeding brought against the state by the trustee was a suit and held the action barred in light of the unconstitutionality of § 106.[12]

The lower courts have struggled, however, to determine when bankruptcy proceedings *other than* adversary proceedings constitute suits under the Eleventh Amendment. Indeed, although the issue has been addressed in a number of different courts, the Court need look no further than the Fourth Circuit's own decisions over the course of the last two years to conclude that guidance on the "suit" issue in the bankruptcy context is critically needed.

Shortly after it decided *Schlossberg*, the Fourth Circuit addressed the "suit" question more extensively in *Antonelli, supra*. *Antonelli* involved a claim by state taxing authorities that the Eleventh Amendment "barred the bankuptcy court from exercising jurisdiction over them in the confirmation proceeding," and that they were therefore free to collaterally attack the order confirming the plan as part of their effort to recover payment of taxes exempted under 11 U.S.C. § 1146(c). 123 F.3d at 786. The Fourth Circuit held that "[t]he confirmation order in this case was not entered in a suit 'against one of the United States' filed by a private party." *Id.* The court relied on the facts that "[t]he state was not named a defendant, nor was it served with process mandating that it appear in a federal court," and distinguished "the case in which a debtor, a trustee or other private person files an adversary action against the state in the bankruptcy court, causing the bankruptcy court to issue process summonsing the state

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[12] *See also, e.g., Mitchell* v. *California Franchise Tax Bd. (In re Mitchell)*, 222 B.R. 877, 882-883 (B.A.P. 9th Cir. 1998); *Texas Higher Educ. Coord. Bd.* v. *Greenwood (In re Greenwood)*, 237 B.R. 128 (N.D. Tex. 1999); *A.H. Robins Co.* v. *Dieleuterio (In re A.H. Robins Co.)*, 235 B.R. 406 (Bankr. E.D. Va. 1999); *Bakst* v. *New Jersey (In re Ross)*, 234 B.R. 199 (Bankr. S.D. Fla. 1999); *In re Doiel*, 228 B.R. at 441 n.1; *Lapin*, 226 B.R. at 645.

to appear." *Id.* at 786-787. Instead, the court noted, "the power of the bankruptcy court to enter an order confirming a plan, including a provision interpreting § 1146 (c), derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates." *Id.* at 787.

In *Virginia* v. *Collins, supra,* the Fourth Circuit considered the "suit" issue in a slightly different procedural setting. Four years after the debtors had received a discharge order, Virginia sought to recover on pre-bankruptcy judgments against the debtors. When the debtors filed a motion to re-open their bankruptcy case for a determination whether the debts were dischargeable, the court of appeals held that no "suit" was involved: "The Collinses' motion to reopen was not a suit against the Commonwealth of Virginia, just like the plan confirmation proceeding in *Antonelli* was not a suit against the State of Maryland." 173 F.3d at 929. "The Commonwealth * * * was not named as a defendant, was not served with process, and was not compelled to appear in bankruptcy court. The Commonwealth was free to respond to the motion or ignore it. In these circumstances, the motion to reopen was not a suit 'against one of the United States' within the meaning of the Eleventh Amendment." *Id.*

The Fourth Circuit changed course in this case. As the matter arose in the bankruptcy court, NVR did not file an adversary proceeding against the taxing authorities, and the authorities were not named as defendants. No process was issued against the state authorities, and they were not required to appear. Instead, NVR by its motion "requested that the bankruptcy court, pursuant to its retained jurisdiction over the Plan, enter an order clarifying the intended coverage of the Plan's exemption provision." App. 51a. While *Antonelli* and *Collins* had held that the "suit" question was controlled by the state's non-defendant status, together with the absence of process and

compulsion, the Fourth Circuit concluded here that those factors were *not* controlling.

This conclusion is at odds not only with the Fourth Circuit's earlier decisions but also with the resolution of the "suit" issue by other courts in the bankruptcy context. Thus, for example, in *Texas* v. *Walker*, 142 F.3d 813 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999), the court of appeals determined that the Eleventh Amendment does not "prevent[] the discharge of a debt owed to a state in a bankruptcy proceeding in which the state does not participate in any fashion." *Id.* at 820. While proceedings "directly against a state that has not filed a proof of claim in a bankruptcy case" would offend the Eleventh Amendment, *id.* at 823; *see also id.* at 821 & n.11, the court rejected "the equation of a bankruptcy case with a suit *against* the state." *Id.* at 822 (emphasis in original). In the bankruptcy proceeding in which the debt at issue was discharged, "[t]he state never was hauled into federal court against its will," *id.*, and the court therefore found no Eleventh Amendment immunity.

District and bankruptcy courts have likewise been asked to rule on the recurring suit question in different bankruptcy contexts. *In re Barrett Refining Corp.*, 221 B.R. 795 (Bankr. W.D. Okla. 1998), for example, rejected a state's argument that the court was without jurisdiction to adjudicate its proof of claim, finding that a bankruptcy case is not a suit against a state because "a bankruptcy petition does not seek damages against another party, * * * there is no opposing party whose property is subject to attachment, * * * [and] compulsory process is not issued against an opposing party by the filing of a bankruptcy petition." *Id.* at 804. The court in *Smith* v. *Psychiatric Hospitals of Fla., Inc. (In re Psychiatric Hospitals of Fla., Inc.)*, 216 B.R. 660 (M.D. Fla. 1998), likewise held that a debtor's motion to determine tax liability, which did not seek the entry of a money judg-

ment against the state, was not a suit under the Eleventh Amendment. *International Heritage, Inc.* v. *Gilbert (In re International Heritage, Inc.)*, 239 B.R. 306, 310 (Bankr. E.D.N.C. 1999), held that "[p]roceedings by the bankruptcy court to ascertain the reach of the automatic stay * * * may affect the rights of a state, but nevertheless * * * are not precluded by the Eleventh Amendment." And in *Phelps* v. *Sallie Mae Loan Service Center (In re Phelps)*, 237 B.R. 527, 534 (Bankr. D.R.I. 1999), the court relied on *Collins* to find no suit where the governmental entity "was not summoned to appear before this Court [and] was not served with process." [13]

This Court has observed that "[f]or Eleventh Amendment purposes, the line between permitted and prohibited suits will often be indistinct." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986). As the cases discussed above demonstrate, the lower courts have focused a great deal of attention on attempting to discern the line between permitted and prohibited suits in the bankruptcy context. While adversary proceedings arising in bankruptcy are generally held to be suits, courts considering the issue in a variety of other procedural contexts have relied on the absence of process and compulsion to find that states appearing in bankruptcy cases are not being subjected to "suit" under the Eleventh Amendment. The opinion in this case, by contrast, found that NVR's motion constituted a suit even though the state actors were not served with process and not compelled to appear, and even though NVR sought no coercive relief against the states

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[13] Although this Court will not ordinarily grant certiorari to review a conflict between a court of appeals and a district court, it will do so when the conflict involves a bankruptcy court decision. *See Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 557 (1990) (granting certiorari "[t]o address a conflict among Bankruptcy Courts"). Here, the Fourth Circuit's decision conflicts not only with decisions of bankruptcy courts but also those of circuit and district courts.

but rather a declaration by the bankruptcy court on the scope and reach of a confirmed plan.

C. The Decision Below Misinterprets This Court's Decisions And Unnecessarily Removes Important Powers From Bankruptcy Courts

As this Court observed more than a century ago, "[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U.S. 43, 505 (1887). *See also Puerto Rico Aqueduct and Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). This much has been clear since at least *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821), in which Chief Justice Marshall explained that the prohibition on suits "commenced or prosecuted" against the states could be understood by reference to the process:

> To commence a suit, is to demand something *by the institution of process in a Court of justice*; and to prosecute the suit, is * * * to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court. [*Id.* at 408 (emphasis added).]

As the Court explained last Term in *Alden* v. *Maine*, 119 S. Ct. 2240 (1999), the objection to *compelling* the sovereign to appear before a court predated not only the Eleventh Amendment but the Constitution itself. Thus, Blackstone observed that sovereign immunity was grounded in the fact that no court could have jurisdiction over the king, and Madison explained that "it is not in the power of any individuals to call any state into court." *Id.* at 2248, 2249 (quotation omitted).

The objection to coercion of the states—which this Court has called "[t]he very object and purpose" of the

Eleventh Amendment, *Ayers*, 123 U.S. at 505—is simply not present in this case. The Fourth Circuit below acknowledged that "the bankruptcy court did not issue a summons to either Maryland or Pennsylvania * * * [T]he state[s] had notice of the proceeding and [were] free to join the action, but [were] not compelled to submit to federal court jurisdiction." App 19a. While this factor had been dispositive in *Antonelli, Collins, Walker*, and the various district and bankruptcy court decisions discussed above, the panel here concluded that NVR's request for interpretation of the Joint Plan was a suit against the tax authorities because, in the Court's view, its resolution, and effective relief, depended on jurisdiction over the state authorities. App. 19a-20a. In this judgment, the Fourth Circuit erred.

The court of appeals placed great weight on the mistaken assertion that NVR's motion, if successful, would directly impact the states' treasuries. App. 21a. But that is plainly not the case; NVR sought a declaration from the bankruptcy court about the meaning and scope of the Joint Plan, its order of confirmation, and the federal bankruptcy statute. Had its motion been granted in full, no judgment would have been entered against the state taxing authorities, and any effort by NVR to collect the taxes it paid under the first day orders would have to have been pursued in state court. This does not mean that the declaration NVR sought would have been "advisory and improper," App. 20a, for it has long been recognized that bankruptcy courts—like other courts—have post-confirmation authority concerning the execution, implemention, and interpretation of a confirmed plan. *See, e.g.*, 11 U.S.C. § 1142; Fed. R. Bankr. P. 3020(d). *See also Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239-240 (1934). And, in recognition of the supremacy of federal law, a state court would be required to treat the bankruptcy court's declaration as the final word on the meaning of the Joint Plan.

While the declaration NVR sought was therefore far from advisory, it was nevertheless not a "suit" against the taxing authorities. Rather, as noted, those entities were not served with process or compelled to appear. This Court's cases have long recognized that states choosing to appear to defend their interests in this context are not being subjected to "suit" in contravention of the Eleventh Amendment. As the Court observed in *New York* v. *Irving Trust Co.*, 288 U.S. 329, 333 (1933), "[i]f a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated." Here, the taxing authorities desire to participate in the assets of NVR, yet have come to federal court seeking an exemption from the power of that court to interpret the meaning of its decrees. While the states are certainly free to choose that course, the proceeding at issue does not constitute a suit against them in violation of the Eleventh Amendment.

D. The States Themselves Have Recognized The Need For This Court's Guidance On The Suit Question, And The Issue Has Far-Reaching Significance

The states themselves recently recognized the need for this Court's intervention to determine the meaning of the Eleventh Amendment's reference to "suit" as it applies in bankruptcy cases. In *Virginia* v. *Collins*, No. 99-380 (filed Aug. 31, 1999), Virginia seeks this Court's review of the Fourth Circuit's *Collins* decision holding that the debtors' effort to reopen the bankruptcy proceeding to secure a determination that debts to the state were dischargeable was not a suit under the Eleventh Amendment. *See* 173 F.3d 924. The Commonwealth argues in its petition that this Court should intervene to resolve the "confusion" that the Fourth Circuit's decision

"has caused in other circuits and, indeed, even within the Fourth Circuit itself," Pet. 20; *id.* at 22 (citing *NVR* decision), and urges that "continuing confusion over the scope of the application of the Eleventh Amendment to bankruptcy and other federal laws serves the interests of no one." *Id.* at 23. We agree, as do the thirty-four other states—including Maryland and Pennsylvania—which joined in an amicus brief supporting Virginia's effort to gain this Court's review of the "suit" question in the *Collins* case. *See* Brief of the Amicus States in Support of Virginia, No. 99-380 (filed Sept. 29, 1999).

The question is far from academic. While, as noted, bankruptcy proceedings are in many respects unique, the issue presented here certainly merits this Court's attention. According to one 1996 study, for example, states were creditors in almost 363,000 bankruptcy cases and held claims totaling $3.6 billion. Waxman & Christian, *Federal Powers After* Seminole Tribe: *Constitutionally Bankrupt,* 47 Drake L. Rev. at 494. As the above discussion demonstrates, in the last two years alone, this issue has arisen in numerous cases, and the widespread assumption that 11 U.S.C. § 106(a) is unconstitutional in light of this Court's recent Eleventh Amendment cases will only increase the number of cases presenting the "suit" question. The uncertainty and protracted litigation that accompany such disputes are detrimental to Congress's goals of having bankruptcy courts " 'deal efficiently and expeditiously with all matters connected with the bankruptcy estate,' " *Celotex Corp.* v. *Edwards,* 514 U.S. 300, 308 (1995) (quotation omitted), and permitting both debtors and creditors to gain fair and efficient resolution of bankruptcies and distribution of assets. This Court should grant the petition to resolve the recurring "suit" issue before the courts, debtors, and creditors expend additional resources considering it.

II. THIS COURT SHOULD ALSO GRANT CERTIORARI TO RESOLVE THE CONFLICT OVER WHETHER SECTION 1146(c) PROVIDES AN EXEMPTION FOR PRE-CONFIRMATION TRANSFERS MADE "UNDER A PLAN CONFIRMED"

A. The Fourth Circuit's Decision Conflicts With A Leading Decision of the Second Circuit And With Decisions Following the Second Circuit

The Fourth Circuit's decision conflicts with the Second Circuit's decision in *Jacoby-Bender* and the numerous decisions of lower courts that have relied on *Jacoby-Bender*. In view of the importance of § 1146(c) and the recurring nature of the question presented here, this Court should grant certiorari to resolve this conflict. *See Pennsylvania Dep't of Pub. Welfare*, 495 U.S. at 557 (granting certiorari "[t]o address a conflict among Bankruptcy Courts"); *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 202 (1983) ("We granted certiorari to resolve this conflict in an important area of the law under the new Bankruptcy Code.").

In *Jacoby-Bender*, the Second Circuit considered whether a transfer of property was made "under a plan confirmed"—and was therefore entitled to an exemption under § 1146(c)—where the reorganization plan at issue did not specifically authorize the transfer. Observing that "Congress's apparent purpose in enacting section 1146 was to facilitate reorganizations through giving tax relief," the court concluded that whether the plan empowered the debtor to make a specific transfer was "irrelevant to [its] determination that [it] took place 'under' the plan within the meaning of section 1146(c)," because the plan's consummation depended upon the transfer at issue. 758 F.2d at 841. Noting that the legislative history of § 1146(c) indicates that it applies to transfers "dealt with under the consolidated chapter 11," *see id.* at 841-842 (quoting H.R. Rep. No. 595 (1977)), the court

determined that where a transfer "is necessary to the consummation of a plan, the plan seems implicitly to have 'dealt with' the transfer instrument." *Id.* at 842.

Accordingly, under *Jacoby-Bender*, a transfer is "under a plan confirmed" where it is "necessary to the consummation of a plan." *Id.* at 841. In the wake of *Jacoby-Bender*, lower courts have held transfers exempt under § 1146(c) where they were necessary to the consummation of a plan, regardless of whether they were made before or after its confirmation. *See, e.g., City of New York* v. *Baldwin League of Indep. Schools (In re Baldwin League of Indep. Schools)*, 110 B.R. 125, 127 (S.D.N.Y. 1990); *City of New York* v. *Smoss Enters. Corp. (In re Smoss Enters. Corp.)*, 54 B.R. 950, 951 (E.D.N.Y. 1985); *In re Amsterdam Ave. Dev. Assocs.*, 103 B.R. 454, 457 (Bankr. S.D.N.Y. 1989); *In re Permar Provisions, Inc.*, 79 B.R. 530, 534 (Bankr. E.D.N.Y. 1987).

The Fourth Circuit's decision is directly at odds with *Jacoby-Bender* and its progeny. As the lower courts in this case expressly found, the transfers at issue were "essential to the formulation, confirmation and *consummation* of the Confirmed Plan and to the Debtors' effective reorganization and emergence from bankruptcy." *See* App. 48a, 101a (emphasis added). That finding has never been challenged. Under *Jacoby-Bender*, the transfers would therefore be exempt under § 1146(c). Yet the Fourth Circuit held—in direct conflict with *Jacoby-Bender*—that they were *not* exempt under § 1146(c).

The Fourth Circuit attempted to distinguish *Jacoby-Bender*, concluding that it applied the "necessary to the consummation of a plan" test "solely to interpret the extent of a reorganization plan." App. 25a. The Fourth Circuit therefore did "not take issue with the Second Circuit's logic as it was applied in *Jacoby-Bender* because it was employed to interpret a *plan*—i.e., to *identify which*

transfers were necessary to, and thus contemplated by, 'a plan confirmed.' " App. 25a-26a.

But the facts of this case are equally amenable to this application of the *Jacoby-Bender* test. In order to determine whether the transfers at issue were made "under a plan confirmed," that language must be interpreted and applied to the facts. The Second Circuit's test is clearly based on an interpretation of § 1146(c). By refusing to apply the *Jacoby-Bender* test—and conclude, as did the other courts below, that the transfers in this case were "necessary to the *consummation* of the plan"—the Fourth Circuit created a conflict with the Second Circuit.

The Fourth Circuit deepened the conflict by expressly rejecting lower court decisions that have faithfully applied *Jacoby-Bender* and concluded that pre-confirmation transfers were exempt under § 1146(c). The court concluded that these decisions were insignificant because of its mistaken belief that they altered *Jacoby-Bender*'s test by changing "necessary to the consummation of a plan" to "necessary to the confirmation of a plan." App. 26a. But that language in fact appears in only a couple of the decisions adhering to *Jacoby-Bender, see Smoss*, 54 B.R. at 951; *Permar*, 79 B.R. at 534, and not in most. *See, e.g., Baldwin*, 110 B.R. at 127 (pre-confirmation transfer was a necessary step in "consummating the plan"); *In re Lopez Dev., Inc.*, 154 B.R. 607, 609 (Bankr. S.D. Fla. 1993) (§ 1146(c) applied to pre-confirmation transfer because, as *Jacoby-Bender* recognized, purpose of exemption is to facilitate reorganization); *Amsterdam Ave.*, 103 B.R. at 457 (preconfirmation transfer exempt where, "[a]s in *Jacoby-Bender*, consummation of [the] plan 'depended almost entirely upon the sale of [a] building' ").

Moreover, the substitution of "confirmation" for "consummation" in those two cases was of no consequence, as the courts in fact determined that they were necessary to the plan's "consummation." *See Smoss*, 54 B.R. at 951

(transfer was exempt where "plan depended entirely on the sale of the property" which was a "precondition to the confirmation *and implementation* of the plan") (emphasis added); *Permar*, 79 B.R. at 534 (transfer was exempt where it would provide funding for plan). These courts did not, therefore, "alter" the *Jacoby-Bender* test, as the Fourth Circuit would have it. Instead, they merely recognized—correctly—that transfers "necessary to the consummation of a plan" could include those made prior to confirmation. Thus, even if the Fourth Circuit had been able to distinguish *Jacoby-Bender*—which it was not—its decision would still conflict with the decisions that have followed *Jacoby-Bender* and held that pre-confirmation transfers were exempt under § 1146(c).

Because of the Fourth Circuit's ruling, debtors who file for bankruptcy in the Fourth Circuit may not claim the same exemptions to which debtors in the Second Circuit (and other jurisdictions) are entitled. This Court should grant certiorari and resolve the conflict created by the Fourth Circuit's decision to ensure that this important bankruptcy provision is applied uniformly.

B. The Fourth Circuit's Decision Conflicts With The Plain Meaning Of Section 1146(c)

The Fourth Circuit's determination that § 1146(c) does not apply to pre-confirmation transfers also conflicts with the plain meaning of the statute. This conflict—over an "important [issue] in the administration of the bankruptcy laws," *Reading Co.*, 391 U.S. at 475—is an independent basis for granting certiorari. S. Ct. Rule 10(c).

Section 1146(c) provides an exemption for transfers made "under a plan confirmed." As this Court has recognized, "the word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991) (emphasis added). The meaning of "under" which makes the most sense in this

context is "in accordance with," as in "[under] contract to deliver" or "rights [under] the law." *See Webster's Third New Int'l Dictionary* 2487 (1961). This is essentially the interpretation that has been adopted by other courts that have considered this issue. *See, e.g., Baldwin*, 110 B.R. at 126 (transfer must be made "in connection with" a plan confirmed); *In re Kerner Printing Co.*, 188 B.R. 121, 124 (Bankr. S.D.N.Y. 1995) (same); *Amsterdam Ave.*, 103 B.R. at 456-457 (same).

Here, it is clear that NVR's pre-confirmation transfers were made "in accordance with" a "plan confirmed." The Plan in this case specifically provides:

> Pursuant to section 1146(c) of the Bankruptcy Code, the issuance, transfer, or exchange of securities pursuant to the Plan, *and the transfer of, or creation of any lien on, any property of any Debtor under, in furtherance of, or in connection with the Plan* shall not be subject to any stamp tax, real estate transfer tax, recordation tax, or similar tax." [Ct. App. J.A. 43 (emphasis added).]

Thus, a transfer is made "in accordance with" the Plan where it is made "in furtherance of, or in connection with the Plan." As the lower courts in this case recognized, that is true of NVR's pre-confirmation transfers. And the bankruptcy court's interpretation of its own confirmation order, in particular, warrants "substantial deference." *Colonial Auto Center* v. *Tomlin (In re Tomlin)*, 105 F.3d 933, 941 (4th Cir. 1997).

This interpretation follows as a matter of bankruptcy policy. *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (statute should be interpreted consonant with "the provisions of the whole law, and * * * its object and policy") (quotation omitted). As the concurring judge below observed, reading the statute to encompass pre-confirmation trans-

fers would comport with a central purpose of our bankruptcy laws: " 'permitting business debtors to reorganize and restructure their debts in order to revive the debtors' businesses and thereby preserve jobs and protect investors.' " App. 32a (quoting *Toibb* v. *Radloff*, 501 U.S. at 163).

This plain meaning interpretation is also supported by the legislative history of § 1146(c), which indicates that Congress took a broad view of the statute's applicability:

> Section 1146(c) of title 11 broadens the exemption to any stamp tax or similar tax on a security or a transfer instrument dealt with under the consolidated Chapter 11. No opposition has been voiced with respect to this section. [H.R. Rep. No. 595 at 281.]

Transfers "dealt with" under a Chapter 11 proceeding certainly include pre-, as well as post-, confirmation transfers. Thus, Congress clearly did not intend to limit the exemption to post-confirmation transfers.

The Fourth Circuit's contrary holding is based on its erroneous determination that § 1146(c) contains a temporal element, making that holding a foregone conclusion. App. 29a. As the concurring judge was quick to point out, however, "the fact rather than the timing of plan confirmation is the critical issue." App. 31a. Because the transfers at issue were made in accordance with a plan confirmed by the bankruptcy court, it is of no consequence that they were made prior to the plan's confirmation.

Both opinions below noted that " 'a court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed.' " App. 28a. (quoting *California State Bd. of Equalization* v. *Sierra Summit, Inc.*, 490 U.S. 844, 851-852 (1989)); App. 32a. But as explained, Congress *has*

"clearly expressed" an intent *not* to limit the exemption provided by § 1146(c) to post-confirmations transfers. Moreover, "there are countervailing principles of liberal construction especially pertinent to bankruptcy," *Mensh* v. *Eastern Stainless Corp. (In re Eastmet Corp.)*, 907 F.2d 1487, 1490 (4th Cir. 1990), and an interpretation should not defeat a statute's purpose. *United States* v. *Braverman*, 373 U.S. 405, 408 (1963). The Fourth Circuit's decision, however, does just that.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 98-2211

In re: NVR, LP,

Debtor.

NVR HOMES, INCORPORATED,

Plaintiff-Appellee,

v.

CLERKS of the CIRCUIT COURTS for ANNE ARUNDEL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for BALTIMORE, MARYLAND; CLERKS of the CIRCUIT COURTS for CARROLL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for FREDERICK COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HARFORD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HOWARD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for MONTGOMERY COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for PRINCE GEORGE'S COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for WASHINGTON COUNTY, MARYLAND,

Defendants-Appellants,

and

FRANKLIN PARK BOROUGH; HAMPTON TOWNSHIP; HAMPTON TOWNSHIP SCHOOL DISTRICT; SENECA VALLEY SCHOOL DISTRICT; MOON AREA SCHOOL DISTRICT; MOON TOWNSHIP; NORTH ALLEGHENY SCHOOL DISTRICT; SHALER AREA SCHOOL DISTRICT; COMMONWEALTH OF PENNSYLVANIA,

Defendants.

No. 98-2244

IN RE: NVR, LP,

Debtor.

NVR HOMES, INCORPORATED,

Plaintiff-Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA,

Defendant-Appellant,

and

FRANKLIN PARK BOROUGH; HAMPTON TOWNSHIP; HAMPTON TOWNSHIP SCHOOL DISTRICT; CLERKS of the CIRCUIT COURTS for ANNE ARUNDEL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for BALTIMORE, MARYLAND; CLERKS of the CIRCUIT COURTS for CARROLL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for FREDERICK COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HARFORD COUNTY MARYLAND; CLERKS of the CIRCUIT COURTS for HOWARD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for MONTGOMERY COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for PRINCE GEORGE'S COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for WASHINGTON COUNTY, MARYLAND; SENECA VALLEY SCHOOL DISTRICT; MOON AREA SCHOOL DISTRICT; MOON TOWNSHIP; NORTH ALLEGHENY SCHOOL DISTRICT; SHALER AREA SCHOOL DISTRICT,

Defendants.

No. 98-2271

IN RE: NVR, LP,

Debtor.

NVR HOMES, INCORPORATED,

Plaintiff-Appellee,

v.

SENECA VALLEY SCHOOL DISTRICT,
SHALER AREA SCHOOL DISTRICT,

Defendants-Appellants,

and

FRANKLIN PARK BOROUGH; HAMPTON TOWNSHIP; HAMPTON TOWNSHIP SCHOOL DISTRICT; CLERKS of the CIRCUIT COURTS for ANNE ARUNDEL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for BALTIMORE, MARYLAND; CLERKS of the CIRCUIT COURTS for CARROLL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for FREDERICK COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HARFORD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HOWARD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for MONTGOMERY COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for PRINCE GEORGE'S COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for WASHINGTON COUNTY, MARYLAND; COMMONWEALTH OF PENNSYLVANIA,

Defendants.

No. 98-2272

IN RE: NVR, LP,

Debtor.

NVR HOMES, INCORPORATED,

Plaintiff-Appellee,

v.

FRANKLIN PARK BOROUGH;
HAMPTON TOWNSHIP;
HAMPTON TOWNSHIP SCHOOL DISTRICT,

Defendants-Appellants,

and

CLERKS of the CIRCUIT COURTS for ANNE ARUNDEL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for BALTIMORE, MARYLAND; CLERKS of the CIRCUIT COURTS for CARROLL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for FREDERICK COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HARFORD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HOWARD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for MONTGOMERY COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for PRINCE GEORGE'S COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for WASHINGTON COUNTY, MARYLAND; SENECA VALLEY SCHOOL DISTRICT; MOON AREA SCHOOL DISTRICT; MOON TOWNSHIP; NORTH ALLEGHENY SCHOOL DISTRICT; SHALER AREA SCHOOL DISTRICT; COMMONWEALTH OF PENNSYLVANIA,

Defendants.

No. 98-2273

IN RE: NVR, LP,

Debtor.

NVR HOMES, INCORPORATED,

Plaintiff-Appellee,

v.

MOON AREA SCHOOL DISTRICT,
MOON TOWNSHIP;
NORTH ALLEGHENY SCHOOL DISTRICT,

Defendants-Apellants,

and

FRANKLIN PARK BOROUGH; HAMPTON TOWNSHIP; HAMPTON TOWNSHIP SCHOOL DISTRICT; CLERKS of the CIRCUIT COURTS for ANNE ARUNDEL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for BALTIMORE, MARYLAND; CLERKS of the CIRCUIT COURTS for CARROLL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for FREDERICK COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HARFORD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HOWARD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for MONTGOMERY COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for PRINCE GEORGE'S COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for WASHINGTON COUNTY, MARYLAND; SENECA VALLEY SCHOOL DISTRICT; SHALER AREA SCHOOL DISTRICT; COMMONWEALTH OF PENNSYLVANIA,

Defendants.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria
T. S. Ellis, III, District Judge
(CA-87-1238-A, BK-92-11704-DOT)

Argued April 7, 1999
Decided July 12, 1999
Corrected opinion filed: August 16, 1999

Before WILKINSON, Chief Judge, and HAMILTON and WILLIAMS, Circuit Judges.

Vacated in part, affirmed in part, and reversed in part by published opinion. Judge Williams wrote the opinion, in which Judge Hamilton joined. Chief Judge Wilkinson wrote an opinion concurring in part and concurring in the judgment.

OPINION

WILLIAMS, Circuit Judge:

On October 23, 1995, NVR Homes, Inc. (NVR), a former debtor in bankruptcy, filed a motion in accordance with Federal Rule of Bankruptcy Procedure 9014, seeking a declaration that 11 U.S.C.A. § 1146(c) (West 1993) exempted it from certain transfer and recordation taxes that it paid in connection with the transfer of real property during the bankruptcy period. The state and local taxing authorities who had received and refused or

failed to refund the recordation and transfer tax proceeds were located in Pennsylvania and Maryland. Pursuant to Rule 9014, each of the taxing authorities was served with notice of the motion and each responded by filing motions for abstention, dismissal, or summary judgment. On March 25, 1996, the bankruptcy court granted NVR's motion and held that under § 1146(c), NVR was exempt from transfer and recordation taxes on any real property transfers completed between April 6, 1992, the date that NVR filed a bankruptcy petition, and September 30, 1993, the date that its reorganization plan was fully implemented and the bankruptcy period ended.

Thereafter, the state taxing authorities [1] filed motions requesting the bankruptcy court reconsider its order in light of the Supreme Court's interpretation of Eleventh Amendment immunity in *Seminole Tribe v. Florida,* 116 S. Ct. 1114 (1996). On March 28, 1997, the bankruptcy court issued an order amending its judgment dated March 25, 1996, specifically holding that "§ 106 of the Bankruptcy Code is unconstitutional and that the Eleventh Amendment precludes [the bankruptcy court's previous order] from binding the Commonwealth of Pennsylvania and the Maryland circuit court clerks [the state taxing authorities] as collectors of a state transfer tax." (J.A. at 335.)

On appeal, the district court affirmed the bankruptcy court's judgment that NVR was exempt from transfer and recordation taxes under § 1146(c). The district court

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[1] We consider the state taxing authorities to be: the clerks of the circuit courts for Anne Arundel, Baltimore, Carroll, Harford, Howard, Frederick, Montgomery, Prince George's, and Washington Counties to the extent they serve as the collectors of Maryland state taxes; and the Department of Revenue for the Commonwealth of Pennsylvania.

reversed the bankruptcy court's decision that the Eleventh Amendment immunized the state taxing authorities, reasoning that the Rule 9014 motion was not a "suit" for Eleventh Amendment purposes. The district court refused, however, to determine whether the declaratory judgment would be binding upon the state taxing authorities. For the following reasons, we vacate in part, affirm in part, and reverse in part.

I.

The facts of this appeal are largely undisputed and have been thoroughly recited by the lower courts. *See Clerk of the Circuit Court v. NVR Homes, Inc.*, 222 B.R. 514 (E.D. Va. 1998); *In re NVR L.P.*, 206 B.R. 831 (Bankr. E.D. Va. 1997). We will only briefly address them here.

During the 1980s, NVR was a leading homebuilder whose primary operations were located in the states of Virginia and Maryland. In a move to expand its operations in 1987, NVR acquired Ryan Homes, a major homebuilder, and financed the acquisition with over $450,000,000 in debt. The financing was provided by a consortium of banks and the issuance of subordinated debt securities. A short time later, NVR began experiencing declining operating margins and had difficulty in meeting its substantial debt service commitments. Its financial difficulties did not abate, and on April 6, 1992, NVR sought protection under Chapter 11 of the Bankruptcy Code.

The bankruptcy court allowed NVR to continue its business operations essentially uninterrupted while it pursued the development and confirmation of a reorganization plan. From April 6, 1992, the petition date, until September 30, 1993, the date NVR eventually emerged from bankruptcy, NVR made 5,571 transfers of real prop-

erty and paid $8,349,103 in transfer and recordation taxes to state and local taxing authorities. NVR paid just under $7,000,000 of this amount to taxing authorities in Pennsylvania and Maryland.

On July 22, 1993, the bankruptcy court confirmed NVR's plan of reorganization (the Plan), which satisfied the outstanding bank consortium debt with funds from a new debt offering and basically transformed the former subordinated debt holders into equity holders. One section of the Plan, section 4.13, dealt specifically with the issue before us and reads:

> Pursuant to section 1146(c) of the Bankruptcy Code, the issuance, transfer, or exchange of securities pursuant to the Plan, and the transfer of, or creation of any lien on, any property of any Debtor under, in furtherance of, or in connection with the Plan shall not be subject to any stamp tax, real estate transfer tax, recordation tax, or similar tax.

(J.A. at 43.) This section essentially invoked the exemptions already allowed to debtors by 11 U.S.C.A. § 1146(c) (West 1993). Section 1146(c) provides that "[t]he issuance, transfer, or exchange of a security, or the making of an instrument of transfer under a plan confirmed . . ., may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C.A. § 1146(c).

The Plan was quickly implemented and NVR emerged from bankruptcy on September 30, 1993. NVR then began pursuing refunds of the recordation and transfer taxes paid during the bankruptcy period. All of the taxing jurisdictions in the states of Delaware, New York, North Carolina, and Virginia refunded the taxes without protest. Maryland, Pennsylvania, and the taxing authorities therein, however, refused to remit the requested refunds.

To obtain an interpretation of whether the tax payments were exempted under the Bankruptcy Code and the Plan, NVR initiated a Rule 9014 motion under the Federal Rules of Bankruptcy Procedure. The bankruptcy court, and the district court on appeal, determined that section 4.13 of the Plan, pursuant to 11 U.S.C.A. § 1146(c), exempted NVR from paying transfer and recordation taxes during the entire bankruptcy period. The bankruptcy court held, however, that the state taxing authorities were not bound by the determination because of their Eleventh Amendment immunity to suits in federal court. On appeal, the district court reversed that holding and decided that the Eleventh Amendment did not confer immunity upon the state taxing authorities because the Rule 9014 motion was not a "suit" under the Eleventh Amendment.

Two issues are presented to this Court on appeal: first, whether the Eleventh Amendment bars the action in regard to the state taxing authorities; and second, whether § 1146(c) exempts debtors in reorganization from paying transfer and recordation taxes throughout the bankruptcy period.

II.

"We review the judgment of a district court sitting in review of a bankruptcy court de novo, applying the same standards of review that were applied in the district court." *Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843, 847 (4th Cir. 1999). Specifically, "[w]e review the bankruptcy court's factual findings for clear error, while we review questions of law *de novo*." *Loudoun Leasing Dev. Co. v. Ford Motor Credit Co. (In re K&L Lakeland, Inc.)*, 128 F.3d 203, 206 (4th Cir. 1997). Because each of the questions present a purely legal issue, our review is de novo.

A.

Since the Supreme Court issued *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), states have hotly contested the extent of their Eleventh Amendment immunity in federal bankruptcy proceedings. During the past three years, this Court alone has published three opinions clarifying the issue. *See Virginia v. Collins (In re Collins)*, 1999 WL 183800 (4th Cir. Apr. 5, 1999); *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777 (4th Cir. 1997); *Schlossberg v. Maryland (In re Creative Goldsmiths)*, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998). In the case now before us, two states, Maryland and Pennsylvania, again claim Eleventh Amendment immunity from federal jurisdiction in a bankruptcy proceeding. They argue that the lower courts' decisions holding certain transfers exempt from state taxes under 11 U.S.C.A. § 1146(c) (West 1993) can be viewed in only one of two ways: either the ruling was advisory and thus constitutionally impermissible, or the proceeding itself amounted to a "suit" from which Maryland and Pennsylvania were immune under the Eleventh Amendment. If the Eleventh Amendment does grant the states immunity, then the federal courts are deprived of jurisdiction over claims against the states. *See Edelman v. Jordan*, 415 U.S. 651, 678 (1974). The protracted history of the Eleventh Amendment supports Maryland's and Pennsylvania's claims of immunity, and, therefore, we are bound to vacate the action to the extent it applies to the states.

1.

Beginning with the Constitution's ratification, the American populace expressed concern that the new union would unduly subordinate the sovereignty of the states through the exercise of federal judicial power. Proponents of the

Constitution, including Alexander Hamilton and James Madison, ably met these attacks and dismissed the criticisms as completely foreign to any previous or contemporary understanding of sovereign immunity. *See Hans v. Louisiana*, 134 U.S. 1, 12-14 (1890) (discussing the Founders' belief that a state would not be subjected to the power of the federal courts absent express consent); *Edelman*, 415 U.S. at 662 n.9 (providing a summary of historical statements concerning the sovereign immunity of states); *The Federalist* No. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Unfortunately, concerns about state sovereignty proved more legitimate than the Founders believed.

In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Supreme Court held that a state could be subjected to the jurisdiction of federal courts in suits filed by citizens of another state. In response, a shocked nation soon remedied the unpalatable decision by ratifying the Eleventh Amendment, effectively reversing *Chisholm*. *See Hans*, 134 U.S. at 11. The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Determined not again to mistake the ratifying public's original intent, the Supreme Court held in *Hans v. Louisiana* that a state's sovereign immunity also extended to suits filed by one of its own citizens. *See Hans*, 134 U.S. at 20-21; *see also Seminole Tribe*, 116 S. Ct. at 1130.

Over 100 years later, the Supreme Court re-emphasized the import of the Eleventh Amendment and the significant restrictions it enforces against federal court jurisdiction. In *Seminole Tribe*, the Court made clear that Congress

had no authority under its Article I grant of power to abrogate the sovereign immunity of the states. *See Seminole Tribe* 116 S. Ct. at 1131-32. The Supreme Court recognized that the subsequently ratified Fourteenth Amendment fundamentally altered the federal-state balance of power and, accordingly, gave Congress license to abrogate the sovereign immunity of the states in order to enforce the guarantees of the Fourteenth Amendment. *See id.* at 1125. The primary question under the Eleventh Amendment thus became whether Congress had the power to abrogate a state's sovereign immunity—i.e., whether it acted pursuant to its enforcement power under the Fourteenth Amendment.

In *Schlossberg v. Maryland (In re Creative Goldsmiths)*, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998), this Court applied the analysis mandated by *Seminole Tribe* to the Bankruptcy Code's express abrogation of state sovereign immunity. *See* 11 U.S.C.A. § 106 (West Supp. 1999).[2] Finding that Congress enacted the Bankruptcy Code's abrogation provision pursuant to its power under the Bankruptcy Clause, *see* U.S. Const., art. I, § 8, cl. 4, rather than its authority under the Fourteenth Amendment, we concluded that Bankruptcy Code's express abrogation of state sovereign immunity was beyond Congress's authority, *see Schlossberg*, 119 F.3d at 1145-47.

This holding did not end the matter, however, because the Eleventh Amendment does not reach every variety of judicial proceeding. Before the Eleventh Amendment applies, the federal judicial action must fairly be deemed

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[2] Section 106(a) reads as follows: "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following . . . [listing Bankruptcy Code sections]." 11 U.S.C.A. § 106(a) (West Supp. 1999)

a "suit." The Supreme Court roughly outlined the contours of a "suit" for purposes of the Eleventh Amendment in an early opinion authored by Chief Justice Marshall:

> What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, the being put in possession of that right whereof the party injured is deprived. The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the Mirror to be the lawful demand of one's right. . . . Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 407-08 (1821) (internal quotation marks omitted). Later, the Supreme Court observed that suits could be defined by looking to "the essential nature and effect of the proceeding." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945); *see also In re New York*, 256 U.S. 490, 500 (1921) (holding that a determination under the Eleventh Amendment requires "that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record"). A thorough analysis of whether a judicial proceeding constitutes a suit must accordingly consider both the procedural posture and substantive nature of the proceeding. Moreover, if the substance of "the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit." *Ford Motor Co.*, 323 U.S. at 464.

In *Schlossberg*, 119 F.3d at 1140, *Maryland v. Antonelli Creditor's Liquidating Trust*, 123 F.3d 777 (4th Cir. 1997), and most recently in *Virginia v. Collins*, 1999 WL 183800 (4th Cir. Apr. 5, 1999), we distinguished the exercise of a federal court's jurisdiction to dispose of a debtor's estate from a suit against a state. In *Schlossberg*, a trustee brought an action against the State of Maryland to recover a state income tax payment that was alleged to be a preferential transfer. *See Schlossberg*, 119 F.3d at 1142. We held that an adversary proceeding initiated by the debtor's estate, seeking a return of property from the state, violated the Eleventh Amendment and was impermissible unless the state had waived its immunity.[3] *See id.* at 1147.

Antonelli presented a very different scenario. In that case, the State of Maryland brought suit in state court to recover unpaid transfer and recordation taxes from the Antonelli Creditor's Liquidating Trust (the Trust), a creation of the bankruptcy process. *See Antonelli*, 123 F.3d at 779. The Trust removed the case to federal court and defended on the ground that the state transfer and recordation taxes were exempt under § 1146(c) of the Bankruptcy Code pursuant to the original bankruptcy court disposition. *See id.* Maryland claimed that it was immune not from the immediate proceeding, but from the effects of the original bankruptcy proceeding, which resulted in the order exempting the taxes. *See id.* at 781. We disagreed. Central to our holding was the fact that

> [t]he state was not named a defendant, nor was it served with process mandating that it appear in a federal court. While it was served with notice of the

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[3] On appeal, NVR does not contend that the states waived their sovereign immunity by agreeing to the bankruptcy court's jurisdiction, and, therefore, we have no occasion to address the issue.

> proposed plan and its confirmation, it was free to enter federal court voluntarily or to refrain from doing so. This is to be distinguished from the case in which a debtor, a trustee or other private person files an adversary action against the state in the bankruptcy court, causing the bankruptcy court to issue process summonsing the state to appear. Such an adversary proceeding would be a suit "prosecuted against one of the United States" and adjudication of that suit would depend on the court's jurisdiction over the state, implicating the Eleventh Amendment's limitation on federal judicial power.

Id. at 786-87. Because the federal court appropriately maintained jurisdiction over the *debtor's estate* and Maryland was free to decide whether to press its interests in the federal court, we concluded that the Eleventh Amendment did not immunize Maryland from the effects of a proceeding that merely confirmed a Chapter 11 reorganization plan.

In *Collins,* this Court's most recent decision applying the Eleventh Amendment to a bankruptcy proceeding, we held that the Eleventh Amendment did not bar a debtor's motion to reopen a bankruptcy case for a determination upon whether a debt to Virginia was dischargeable. *See Collins,* 1999 WL 183800 at *1. During the original bankruptcy proceeding, which disposed of the debtor's estate, Virginia in its role as a creditor was served with notice, but chose not to participate in the proceeding. *See id.* Four years later, Virginia pressed its claim against the debtors, leading to the proceeding's reopening and a determination that the debt to Virginia was discharged. *See id.* As we stated, the jurisdiction "over the dischargeability of debt, just like its jurisdiction to confirm a plan of reorganization, 'derives not from jurisdiction over the state

or other creditors, but rather from jurisdiction over debtors and their estates.' " *Id.* at *5 (quoting *Antonelli,* 123 F.3d at 787). We held that the reopening to determine the status of the debt to Virginia was just a continuation of the original proceeding, and, therefore, not a suit against the state under the Eleventh Amendment. *See id.* at *6.

3.

From the above precedent, we are left to decide whether the case before us is a suit against the state tax authorities or merely a proceeding to clarify a Chapter 11 plan of reorganization. As we must, we turn to an evaluation of the procedure and substance of NVR's Rule 9014 motion. As to the case's procedural posture, two issues are important: first, the degree of coercion exercised by the federal court in compelling the state to attend, *see Antonelli,* 123 F.3d at 786-87; and second, whether the resolution, or the remedy, would require our jurisdiction over the state, *see id.* The substantive consideration focuses upon whether the action was, as stated by Chief Justice Marshall, "the prosecution of some demand in a Court of justice," as opposed to the orderly disposition of an estate, with the states' role limited to that of any other creditor. *Cohens,* 19 U.S. (6 Wheat.) at 407; *see Ford Motor Co.,* 323 U.S. at 464.

At first glance, it appears that this case mirrors *Antonelli* because both cases pose the issue of whether a debtor is entitled to an exemption from taxes under 11 U.S.C.A. § 1146(c) (West 1993). *See Antonelli,* 123 F.3d at 779. That, however, is where the substantive and procedural similarities end. In *Antonelli,* the federal courts were called upon merely to conclude whether a reorganization plan complied with federal law. *See id.* at

787. That interpretive process, by defining the rights and disposition of the estate, collaterally affects the rights of virtually every party related to the estate, including owners, creditors, and employees—even if one happens to be a state. That process, however, generally does not force any party to participate. It in fact may be of some advantage to the remaining participants if a creditor chooses not to participate and consequently forfeits a claim. In *Antonelli,* Maryland claimed immunity from the legal interpretations emanating from the Chapter 11 proceeding when it later brought suit against the Trust operating pursuant to the reorganization plan. *See id.* at 786-87. The Eleventh Amendment, of course, does not free Maryland from federal law, but simply the jurisdiction of federal courts. The Chapter 11 proceeding attempted neither to call Maryland into federal court nor to enforce a federal court order against it. Indeed, the only reason why the issue arose was because Maryland sued to recover funds from the Trust. *See id.* at 779.

The circumstances before use are easily disinguished and look a great deal more like those present in *Schlossberg*. As framed, both *Schlossberg* and the present case sought the payment of funds held by the state; in *Schlossberg* it was the avoidance of an alleged preferential transfer to the state, and here, it is the return of allegedly exempt tax payments made to the state. Furthermore, both situations require the bankruptcy court to maintain jurisdiction over the states. A full review of these crucial characteristics—i.e., the coercion exercised against the states, whether the resolution required federal jurisdiction over the state, and the substance of the remedy sought—leads us to conclude that this bankruptcy court proceeding was indeed a suit prosecuted against Marvland and Pennsylvania.

To begin with, this action was initiated as a motion under Rule 9014 of the Federal Rules of Bankruptcy Procedure. Rule 9014 is entitled "Contested Matters" and as commentators have noted, it is unlike an administrative matter in bankruptcy becaues "there are (at least) two parties who are opposing each other with respect to relief sought by one of them." 10 *Collier on Bankruptcy* ¶ 9014.01 (Lawrence P. King ed., 15th ed. 1999). The motion thus set NVR's interests at odds with the states'. We recognize, however, that the bankruptcy court did not issue a summons to either Maryland or Pennsylvania, although they were served with notice as mandated by Rule 9014. The coercion exercised by the bankruptcy court towards Maryland and Pennsylvania was thus no greater than in a proceeding to determine the disposition of a debtor's estate—the state had notice of the proceeding and was free to join the action, but was not compelled to submit to federal court jurisdiction. As we have stated on other occasions, this position was not an enviable one for the states because they either had to enter federal court to defend their rights or to allow the court to proceed without the benefit of their arguments. *See Collins*, 1999 WL 183800 at *6. Nevertheless, "it does not amount to the exercise of federal judicial power to hale a state into federal court against its will and in violation of the Eleventh Amendment." *Antonelli*, 123 F.3d at 787. Accordingly, this characteristic of the proceeding does not compel us to hold that the action was a suit against the states.

The ultimate resolution of the dispute between NVR and the states does require, however, that the federal courts exercise jurisdiction over the states. The states persuasively framed this issue by noting that if the federal court action could not result in ordering the states to return the tax payments, then any opinion issued would

be advisory and improper. *See Hewitt v. Helms*, 482 U.S. 755, 761 (1987) ("The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*."). The district court attempted to tip-toe around the issue by stating, "Neither reached nor decided here is the question whether the bankruptcy court's [order declaring NVR exempt from the transfer and recordation taxes] is binding in any way on the [state] [t]axing [a]uthorities." *Clerk of the Circuit Court v. NVR Homes, Inc.*, 222 B.R. 514, 521 (E.D. Va. 1998). It is apparent, however, that absent the ability of the bankruptcy court to exercise jurisdiction over the states and compel the turnover of the tax payments, no remedy effectively could be granted. This case is indeed one in which "adjudication . . . depend[s] on the court's jurisdiction over the state." *Antonelli*, 123 F.3d at 787. This finding alone is enough to determine that the action, if it is to meet the requirements of Article III, is a suit against the states.

Moreover, the substance of NVR's motion demands affirmative action by Maryland and Pennsylvania. *See Cohens*, 19 U.S. (6 Wheat) at 407-08; *Texas v. Walker*, 142 F.3d 813, 823 (5th Cir. 1998) (noting that adversary proceedings *initiated against a state* during the bankruptcy process, absent a waiver, would offend the Eleventh Amendment). NVR is demanding payment from the Maryland and Pennsylvania treasuries. Although federal *law* may reign supreme in the bankruptcy context, the federal *courts* do not necessarily reign supreme over an uncontesting state's treasury. *See, e.g., Sacred Heart Hosp. v. Pennsylvania (In re Sacred Heart Hosp.)*, 133 F.3d 237, 243 (3d Cir. 1998) (citing *Seminole Tribe*, 517 U.S. at 71-74) ("Even when the Constitution vests in

Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."). As courts have recognized in similar contexts, a state is closely identified with its treasury and an action leading to an order forcing a payment to citizens is the quintessential "suit" under the Eleventh Amendment. *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48-49 (1994) (noting the almost unanimous view that the primary factor in determining whether a state is immune from a federal judicial proceeding depends upon whether the action directly impacts the state treasury); *Ford Motor Co.*, 323 U.S. at 464; *Gray v. Laws*, 51 F.3d 426, 433 (4th Cir. 1995) ("[I]t appears that a determination that the state treasury will be liable for a particular judgment is largely, if not wholly, dispositive of Eleventh Amendment immunity. . . ."); *see also CSX Transp., Inc. v. Board of Public Works*, 138 F.3d 537, 541 (4th Cir.) (distinguishing actions that have direct effects on a state treasury with those having only ancillary effects), *cert. denied*, 119 S. Ct. 63 (1998); *cf. Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 102 (1989) (holding that 11 U.S.C.A. § 106(c) (West 1993) does not allow federal courts to enter money judgments against the states).[4] The demand for money from a state is a strong indication that a federal judicial proceeding is indeed a suit against the state under the Eleventh Amendment.

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[4] Concurring in *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989), Justice Scalia found it unnecessary to interpret § 106(c), and instead stated that "Congress lacks authority under the Bankruptcy Clause to abrogate the States' immunity from money-damages actions." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992) (summarizing Justice Scalia's concurrence in *Hoffman*, 492 U.S. at 105).

In sum, despite the fact that neither Maryland nor Pennsylvania suffered the indignity of being summonsed to appear in a federal court, we determine that they are immune from the prosecution of NVR's Rule 9014 motion. The motion initiated a "contested matter" pitting Maryland and Pennsylvania against NVR, a citizen of their own state or of another state. The "suit" clearly sought a determination that the states owed NVR money —repayment of exempt transfer and recordation taxes— and a favorable decision would require that a federal court raid Maryland's and Pennsylvania's treasuries. Because NVR "commenced or prosecuted" a suit against the states, sovereign immunity applies, and the suit is barred as to the states.

The district court's holding that the states might not be bound by a federal interpretation of § 1146(c), secures no satisfaction for NVR, thus making a decision advisory and beyond a federal court's Article III power.[5] We think

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[5] If, instead, our decision would act only as res judicata in a later state court or state administrative proceeding, then the issuance of the judgment would still be improper. The Supreme Court observed in a similar circumstance:

> We think that the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liabiilty, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment.

Green v. Mansour, 474 U.S. 64, 73 (1985). The Court also noted that "if the federal judgment would not have such an effect, then it would serve no useful purpose as a final determination of rights." *Id.* (internal quotation marks omitted).

it best to avoid such judicial gerrymandering and, instead, concede that our constitutional power to enforce federal bankruptcy law, absent a waiver of immunity, does not allow for the forced extraction of payments from a sovereign state's treasury.

B.

Although our holding above moots the issue of a § 1146(c) exemption as applied to the state taxing authorities, it does not bar the action in relation to the local taxing authorities. Local governments do not enjoy sovereign immunity under the Eleventh Amendment. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 690 n.54 (1978); *Gray*, 51 F.3d at 431.

The local taxing authorities argue that a proper interpretation of § 1146(c) does not provide tax exemptions for preconfirmation transfers taking place in the ordinary course of business. Both the bankruptcy court and the district court rejected that argument, however, and held that § 1146(c) exempted NVR from paying the transfer and recordation taxes on the numerous property transfers that it accomplished throughout the bankruptcy period. *See NVR Homes, Inc.*, 222 B.R. at 519. In reaching this determination, the courts relied on section 4.13 of the Plan as authorized by § 1146(c) of the Bankruptcy Code.

For convenience, we will restate the terms of those provisions here. Section 1146(c) provides that "[t]he issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed . . ., may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C.A. § 1146(c). Section 4.13 of the Plan reads:

> Pursuant to section 1146(c) of the Bankruptcy Code, the issuance, transfer, or exchange of securities pursu-

> ant to the Plan, and the transfer of, or creation of any lien on, any property of any Debtor under, in furtherance of, or in connection with the Plan shall not be subject to any stamp tax, real estate transfer tax, recordation tax, or similar tax.

(J.A. at 43.) The parties do not dispute that the transfer and recordation taxes at issue fell under the plain terms of § 1146(c) or that the property transfers constituted "[t]he issuance, transfer, or exchange of a security, or the making or delivery of an instrument or transfer." Instead the question presented to us is whether the transfers were made "under a plan confirmed"—in accordance with the statute.

The lower courts reasoned that all of the property transfers consummated during the bankruptcy period were necessary to NVR's reorganization and emergence from bankruptcy. Therefore, they concluded that the transfers were "all in furtherance of, or in connection with the Plan," under section 4.13. Furthermore, the lower courts held that the necessity of the transfers satisfied § 1146(c)'s requirement that they be made "under a plan confirmed." [6] This logic has enjoyed some acceptance by other courts, primarily by courts claiming to adhere to the Second

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[6] The bankruptcy court stated: "NVR's transfers of real property at issue here were made clearly 'in furtherance of' and 'in connection with' the Plan. They were crucial to the formulation, the confirmation, and the consummation of the Confirmed Plan, and were necessary to the Debtors' emergence from bankruptcy." (J.A. at 286-87).

Similarly, the district court stated: "[T]he post-petition, pre-confirmation property transfers here in issue enabled NVR to remain a viable operation and avoid liquidation. Thus, nothing in the language of the Plan nor in the statutory exemption itself restricts the application of § 1146(c) to transactions occurring after the Plan's confirmation." *NVR Homes, Inc.*, 222 B.R. at 519 (footnote omitted).

Circuit's decision in *City of New York v. Jacoby-Bender, Inc. (In re Jacoby-Bender, Inc.)*, 758 F.2d 840 (2d Cir. 1985).

In *Jacoby-Bender*, the Second Circuit faced the question of whether § 1146(c) could exempt a debtor from paying city transfer taxes on a Chapter 11 property sale that was not specifically authorized in a reorganization plan, which already had been confirmed by the bankruptcy court. *See id.* at 841; *Jacoby-Bender*, 40 B.R. 10, 11-12 (Bankr. E.D.N.Y. 1984). The succinct issue presented was thus whether the confirmed reorganization plan encompassed the property sale, thereby making it part of a "plan confirmed" under § 1146(c). Holding that § 1146(c) extended to the property sale, the court noted that it was irrelevant whether the plan "empower[ed] the debtor to make a *specific* sale or deliver a *specific* deed." *Jacoby-Bender*, 758 F.2d at 841 (emphasis added). Instead, the court framed the question as whether the sale was "necessary to the consummation of a plan." *Id.* at 842. The Second Circuit thus applied its test solely to interpret the extent of a reorganization plan.

Unlike the case before us, *Jacoby-Bender* did not deal with a preconfirmation transfer, but a postconfirmation transfer that, although not *specifically* authorized by the plan, was clearly necessary to the confirmed plan's *consummation*, i.e., the eventual emergence from bankruptcy and, as the court decided, it was thereby implicitly authorized by the plan. Depending on the type and size of debtor at issue and the complexity of the reorganization, a reorganization plan might well be worded either in specific terms identifying each and every transfer or in much broader language that generally outlines the activities that must occur to consummate the plan. We do not take issue with the Second Circuit's logic as it was applied

in *Jacoby-Bender* because it was employed to interpret a *plan*—i.e., to *identify which transfers* were necessary to, and thus contemplated by, "a plan confirmed."

Lower courts, however, have extended the Second Circuit's language and altered *Jacoby-Bender*'s holding, changing the test from "necessary to the consummation of a plan," to "necessary to the confirmation of a plan." *See City of New York v. Smoss Enters. Corp. (In re Smoss Enters. Corp.)*, 54 B.R. 950, 951 (E.D.N.Y. 1985) (finding that a sale was under a plan because "the transfer of property was essential to the *confirmation* of the *plan*" (emphasis added)). Courts began using this seemingly slight alteration of the Second Circuit's language—"confirmation" for "consummation"—and applied it to the interpretation of the scope of § 1146(c) itself, rather than just a plan's provisions.

The fundamental difference between the consummation of a plan and the confirmation of a plan is the timing of the events within the bankruptcy process. Consummation or execution of a reorganization plan cannot take place until the bankruptcy court first confirms a plan. *See* Fed. F. Bankr. P. 3020, 3022. By changing and applying *Jacoby-Bender*'s holding to new and different circumstances, courts used this altered analysis not only to determine what transfers were "under a plan," but also what transfers were "under a plan confirmed." These decisions embraced the belief that if a transfer was "essential to the confirmation of the plan," then it was "under a plan confirmed." *See In re Permar Provisions, Inc.*, 79 B.R. 530, 534 (Bankr. E.D.N.Y. 1987). Naturally, many pre-confirmation transfers then were held to fall under § 1146(c), something that the Second Circuit never held. *See Smoss Enters. Corp.*, 54 B.R. at 951; *In re Lopez Dev., Inc.*, 154 B.R. 607, 609 (Bankr. S.D. Fla. 1993);

In re Permar Provisions, Inc., 79 B.R. at 534. We think it is error to twist the Second Circuit's language to the defeasance of § 1146(c)'s own terms.

Although § 1146(c) relies upon the interpretation of a reorganization plan to determine which transfers fall within the scope of the plan itself, § 1146(c) determines the ultimate extent of its operation. Therefore, holding that every transfer "essential" to a plan's *confirmation* is by definition "under a plan confirmed" is fundamentally flawed. Such a holding makes a plan's terms the master of § 1146(c), instead of deferring to the statute itself. Accordingly, we believe the proposition that every transfer necessary to the confirmation of a plan is "under a plan confirmed" to be without basis in § 1146(c).

In the case before us, NVR advances this flawed logic to claim exemptions on all of its bankruptcy period transfers, both pre- and post-Plan confirmation. The taxing authorities argue to the contrary that any transfers in the ordinary course of business taking place prior to the Plan's confirmation date are not exempt from the recordation and transfer taxes. Although we think it irrelevant under § 1146(c) whether the transfers took place in the ordinary course of business, we agree with the taxing authorities regarding the timing of § 1146(c)'s application, and conclude that transfers taking place prior to the date of a reorganization plan's confirmation are not covered by § 1146(c).[7] *First*, § 1146(c) exclusively, and not a plan's provisions, controls the extent of the statute's own operation. *Second*, the language of § 1146(c) is plain and requires no great manipulation to interpret its terms.

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[7] The local taxing authorities do not argue that the transfers occurring after the date of confirmation and during the remainder of the bankruptcy period are covered by 11 U.S.C.A. § 1146(c) (West 1993).

We are guided to a restrictive interpretation of § 1146(c)'s reach by the Supreme Court's holding in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989), which stated that "[a]lthough Congress can confer an immunity from state taxation, . . . a court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed." *Id.* at 851-52 (citations and internal quotation marks omitted). This passage clearly indicates that tax exemptions should be construed narrowly in favor of the state. It follows that we cannot allow private parties, who would fervently pursue every possible tax advantage, to interpret and extend statutory tax exemptions through the auspices of a reorganization plan, even if the plan is eventually confirmed by a court.

The relatively straightforward issue before us is thus whether preconfirmation transfers are "under a plan confirmed." The district court concluded that neither "the language of the plan nor . . . the statutory exemption itself restricts the application of § 1146(c) to transactions occurring after the Plan's confirmation." *NVR Homes, Inc.*, 222 B.R. at 519. Because we are bound to interpret the text of § 1146(c) in accordance with its plain meaning using the ordinary understanding of words, we must disagree. *See Perrin v. United States*, 444 U.S. 37, 42 (1979).

There is no question that the Plan was eventually confirmed and thus became a "plan confirmed." Furthermore, because the Plan covered all transfers "in furtherance of, or in connection with the Plan," we have no doubt that, if allowed by § 1146(c), the Plan as confirmed would encompass the preconfirmation transfers. The question is whether the word "under," as used in § 1146(c), could extend the statute's effect to preconfirmation transfers. To

ascertain the ordinary understanding of "under," we turn to the dictionary. *See MCI Telecomm. Co. v. AT&T Corp.*, 512 U.S. 218, 228 (1994) (discussing the use of dictionary definitions to interpret statutory text). *Black's Law Dictionary* defines "under" as " 'inferior' or 'subordinate.' " *Black's Law Dictionary* 1525 (6th ed. 1990). Another standard dictionary defines "under" as "[w]ith the authorization of." *See Webster's II New Riverside University Dictionary* 1256 (1988). Logically reading these definitions in the context of § 1146(c), we cannot say that a transfer made prior to the date of plan confirmation could be subordinate to, or authorized by, something that did not exist at the date of transfer—a plan confirmed by the court.

NVR states that "[c]onsistent with the legislative history and judicial interpretations of § 1146(c), NVR's Confirmed Plan (Section 4.13), and the Court's Confirmation Order[, NVR was] provided [with] a § 1146(c) exemption for transfer of any [of its] property 'under, in furtherance of or in connection with' the Plan." (Appellee's Br. at 28-29.) In other words, by mixing § 1146(c), the Plan, the bankruptcy court's order, and a dash of legislative history, private parties in partnership with federal courts can create new and improved tax exemptions for debtors in reorganization proceedings. We do not take the statutory mandates of Congress and the integrity of local law so lightly, nor do we view our own power so expansively. Instead, Congress alone, acting according to its legislative authority under the Bankruptcy Clause in conjunction with the Supremacy Clause, has the ability to preempt the enforcement of other law in the bankruptcy context. *See, e.g., Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 473 (1982); *Perez v. Campbell*, 402 U.S. 637, 652 (1971); *Antonelli*, 123 F.3d at

781. It has done so plainly through the language of § 1146(c).

We must conclude that Congress, by its plain language, intended to provide exemptions only to those transfers reviewed and confirmed by the court. Congress struck a most reasonable balance. If a debtor is able to develop a Chapter 11 reorganization and obtain confirmation, then the debtor is to be afforded relief from certain taxation to facilitate the implementation of the reorganization plan. Before a debtor reaches this point, however, the state and local tax systems may not be subjected to federal interference. Reasonable or not, however, we are bound to implement the statute as it is written, and, therefore, hold that the tax exemptions contained in § 1146(c) may apply only to transfers under the Plan occurring after the date of confirmation.

III.

Summarizing our decision, because the Eleventh Amendment grants immunity to Maryland and Pennsylvania, the judgment is reversed and the district court's order is vacated as to the state taxing authorities. Because we determine that 11 U.S.C.A. § 1146(c) (West 1993) does not exempt NVR from paying transfer and recordation taxes to the local taxing authorities prior to the Plan's confirmation, we also reverse the district court's decision insofar as it allowed tax exemptions on transfers occurring prior to the date of Plan confirmation. We do, however, affirm the district court's conclusion that § 1146(c) grants tax exemptions to property transfers occurring under the confirmed Plan, and thus district court's judgment stands to the extent it covers transfers occurring after the date of Plan confirmation.

VACATED IN PART, AFFIRMED IN PART, AND REVERSED IN PART

WILKINSON, Chief Judge, concurring in part and concurring in the judgment:

I concur in sections I and II.A of the majority opinion. I also agree that 11 U.S.C. § 1146(c) does not apply to preconfirmation transfers. I do not agree, however, that the section's plain language compels this conclusion.

Section 1146(c) provides:

> The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

The majority holds that the phrase "under a plan confirmed under section 1129 of this title" plainly excludes transfers occurring prior to confirmation. The majority finds this plain meaning in the word "under," which it defines as " 'inferior' or 'subordinate.' " *See ante* at 25 (quoting Black's Law Dictionary 1525 (6th ed. 1990)). Because the majority concludes, "a transfer made prior to the date of plan confirmation could [not] be subordinate to . . . something that did not exist at the date of transfer—a plan confirmed by the court," the term "under" must limit section 1146(c)'s applicability to postconfirmation transfers. *Id.*

With respect, I disagree. It is not plain to me that section 1146(c) contains a temporal element. It is also not clear that one must read the section to say anything about the relationship between plan confirmation and the timing of a transfer. It is equally possible that the provision requires only that the transfer occur "under"—i.e., that it be inferior or subordinate to—"a plan" that is ultimately "confirmed." In other words, the fact rather than the timing of plan confirmation is the critical issue.

In a complicated reorganization a debtor-in-possession may operate for some time pursuant to the terms of an unconfirmed plan while it negotiates with its creditors. It is far from obvious that those transfers fall outside section 1146(c).*

Moreover, reading the phrase to require only that the plan ultimately be confirmed would comport with a central purpose of our bankruptcy laws: "permitting business debtors to reorganize and restructure their debts in order to revive the debtors' businesses and thereby preserve jobs and protect investors." *Toibb v. Radloff*, 501 U.S. 157, 163 (1991); *see also Landmark Land Co. v. Resolution Trust Corp. (In re Landmark Land Co.)*, 973 F.2d 283, 288 (4th Cir. 1992) ("[T]he purpose of Chapter 11 is reorganization . . . ."). Applying section 1146(c) to transfers made during the preconfirmation period may provide substantial funds to the debtor. *See, e.g., In re Lopez Dev., Inc.*, 154 B.R. 607 (Bankr. S.D. Fla. 1993) (exempting preconfirmation transfers from $33,600 in stamp taxes). These funds would permit the debtor to emerge from bankruptcy and thereby to generate substantial long-term tax revenues.

Nevertheless, the majority's reading of section 1146(c) is a reasonable one. And when construing an alleged federal abrogation of state and local taxing authority a "court must proceed carefully." *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851 (1989) (internal quotation marks omitted). If Congress wished to exempt a bankrupt from state and municipal taxation, "the intention would be clearly expressed, not

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* If Congress used the words "under a plan ultimately confirmed," that would have made the matter clear. Or if Congress used the words "under a confirmed plan," that would have made its intentions obvious. Congress used neither phrasing—hence the ambiguity.

left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Swarts v. Hammer*, 194 U.S. 441, 444 (1904). I therefore believe it proper to construe section 1146(c) to include only postconfirmation transfers, not because the section's language is patent, but because concerns of federalism require the narrower interpretation.

APPENDIX B

FILED August 10, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2211
CA-97-1238-A
BK-92-11704-DOT

In re: NVR, LP,

Debtor.

NVR HOMES, INCORPORATED,
Plaintiff-Appellee.

v.

CLERKS of the CIRCUIT COURTS for ANNE ARUNDEL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for BALTIMORE, MARYLAND; CLERKS of the CIRCUIT COURTS for CARROLL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for FREDERICK COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HARFORD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HOWARD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for MONTGOMERY COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for PRINCE GEORGE'S COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for WASHINGTON COUNTY, MARYLAND,
Defendants-Appellants,

and

FRANKLIN PARK BOROUGH; HAMPTON TOWNSHIP; HAMPTON TOWNSHIP SCHOOL DISTRICT; SENECA VALLEY SCHOOL DISTRICT; MOON AREA SCHOOL DISTRICT; MOON TOWNSHIP; NORTH ALLEGHENY SCHOOL DISTRICT; SHALER AREA SCHOOL DISTRICT; COMMONWEALTH OF PENNSYLVANIA,

Defendants.

No. 98-2244
CA-97-1238-A
BK-92-11704-DOT

IN RE: NVR, LP,

Debtor.

NVR HOMES, INCORPORATED,

Plaintiff-Appellee,

v.

COMMONWEALTH OF PENNSYLVANIA,

Defendant-Appellant,

and

FRANKLIN PARK BOROUGH; HAMPTON TOWNSHIP; HAMPTON TOWNSHIP SCHOOL DISTRICT; CLERKS of the CIRCUIT COURTS for ANNE ARUNDEL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for BALTIMORE, MARYLAND; CLERKS of the CIRCUIT COURTS for CARROLL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for FREDERICK COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HARFORD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HOWARD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for MONT-

GOMERY COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for PRINCE GEORGE'S COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for WASHINGTON COUNTY, MARYLAND; SENECA VALLEY SCHOOL DISTRICT; MOON AREA SCHOOL DISTRICT; MOON TOWNSHIP; NORTH ALLEGHENY SCHOOL DISTRICT; SHALER AREA SCHOOL DISTRICT,

Defendants.

No. 98-2271
CA-97-1238-A
BK-92-11704-DOT

IN RE: NVR, LP,

Debtor.

NVR HOMES, INCORPORATED,

Plaintiff-Appellee,

v.

SENECA VALLEY SCHOOL DISTRICT,
SHALER AREA SCHOOL DISTRICT,

Defendants-Appellants,

and

FRANKLIN PARK BOROUGH; HAMPTON TOWNSHIP; HAMPTON TOWNSHIP SCHOOL DISTRICT; CLERKS of the CIRCUIT COURTS for ANNE ARUNDEL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for BALTIMORE, MARYLAND; CLERKS of the CIRCUIT COURTS for CARROLL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for FREDERICK COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HARFORD COUNTY, MARYLAND;

CLERKS of the CIRCUIT COURTS for HOWARD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for MONTGOMERY COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for PRINCE GEORGE'S COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for WASHINGTON COUNTY, MARYLAND; COMMONWEALTH OF PENNSYLVANIA,

Defendants.

No. 98-2272
CA-97-1238-A
BK-92-11704-DOT

IN RE: NVR, LP,

Debtor.

NVR HOMES, INCORPORATED,

Plaintiff-Appellee,

v.

FRANKLIN PARK BOROUGH;
HAMPTON TOWNSHIP;
HAMPTON TOWNSHIP SCHOOL DISTRICT,

Defendants-Appellants,

and

CLERKS of the CIRCUIT COURTS for ANNE ARUNDEL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for BALTIMORE, MARYLAND; CLERKS of the CIRCUIT COURTS for CARROLL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for FREDERICK COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HARFORD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS

for HOWARD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for MONTGOMERY COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for PRINCE GEORGE'S COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for WASHINGTON COUNTY, MARYLAND; SENECA VALLEY SCHOOL DISTRICT; MOON AREA SCHOOL DISTRICT; MOON TOWNSHIP; NORTH ALLEGHENY SCHOOL DISTRICT; SHALER AREA SCHOOL DISTRICT; COMMONWEALTH OF PENNSYLVANIA,

Defendants.

No. 98-2273
CA-97-1238-A
BK-92-11704-DOT

IN RE: NVR, LP,

Debtor.

NVR HOMES, INCORPORATED,

Plaintiff-Appellee,

v.

MOON AREA SCHOOL DISTRICT,
MOON TOWNSHIP;
NORTH ALLEGHENY SCHOOL DISTRICT,

Defendants-Apellants,

and

FRANKLIN PARK BOROUGH; HAMPTON TOWNSHIP; HAMPTON TOWNSHIP SCHOOL DISTRICT; CLERKS of the CIRCUIT COURTS for ANNE ARUNDEL COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for BALTIMORE, MARYLAND; CLERKS of the CIRCUIT COURTS for CARROLL

COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for FREDERICK COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HARFORD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for HOWARD COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for MONTGOMERY COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for PRINCE GEORGE'S COUNTY, MARYLAND; CLERKS of the CIRCUIT COURTS for WASHINGTON COUNTY, MARYLAND; SENECA VALLEY SCHOOL DISTRICT; SHALER AREA SCHOOL DISTRICT; COMMONWEALTH OF PENNSYLVANIA,

Defendants.

ON PETITION FOR REHEARING AND REHEARING EN BANC

The appellee's petition for rehearing and rehearing en banc and the appellants' petition for rehearing were submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and as the panel considered the petitions for rehearing and is of the opinion that they should be denied,

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. No. 97-1238-A

CLERK OF THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY, MARYLAND, *et al.*,
Appellants,

v.

NVR HOMES, INC.,
Appellee/Cross-Appellant.

MEMORANDUM OPINION

At issue in this bankruptcy appeal are the following questions:

(1) whether the bankruptcy court properly declared certain post-petition, pre-confirmation real property transfers by debtor exempt from taxation pursuant to 11 U.S.C. § 1146(c); and

(2) whether debtor's initiation of a contested matter requesting a declaration that such transfers were exempt from taxation constituted a "suit" for Eleventh Amendment purposes.

I.

During the 1980's, debtor NVR Homes Inc.[1] grew into a leading home builder and mortgage lending facility. Operating chiefly in the Virginia and Maryland suburbs of Washington D.C., NVR engaged in the practice of buying residential lots, building houses thereon, and then selling the improved lots at a profit. In 1987, in furtherance of its business operations, NVR purchased Ryan Homes, a home construction company. In connection with that acquisition, NVR incurred approximately $235,000,000 in bank debt to a consortium of eight banks ("the Bank Group"). It also issued approximately $220,000,000 in subordinated debt securities, consisting of notes and debentures.

As the real estate market declined in the late 1980's, NVR's decreasing operating profits prevented it from complying with its substantial debt obligations. In the face of mounting financial pressure, NVR was forced to develop and implement an operational restructuring, and to initiate negotiations with the Bank Group on a proposed restructuring of its working capital. Although NVR made progress in implementing this restructuring, the Bank Group declined to continue funding the enterprise after May 31, 1992. As a result, NVR filed a voluntary Chapter 11 bankruptcy petition on April 6, 1992.

The bankruptcy court granted NVR's first day motions, thereby authorizing NVR, as debtor in possession, to sell properties free and clear of liens, and to obtain secured, priority financing. In essence, the bankruptcy court's

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[1] Eleven related debtors filed Chapter 11 petitions in this matter. NVR Homes, Inc., is the successor in interest to two of them, namely NVHomes Limited Partnership and Ryan Operations General Partnership. For simplicity, the debtors are referred to collectively throughout as "NVR."

orders authorized NVR to continue to conduct its day-to-day business substantially as it had prior to commencement of its reorganization case, *i.e.*, to acquire and dispose of lots in the ordinary course of business, and thereby avoid liquidation. Consistent with this authorization, NVR, from April 6, 1992, through September 30, 1993, engaged in 5,571 real property transfers in the States of Maryland, Pennsylvania, Virginia, New York, Delaware, and North Carolina. During that time, NVR paid in excess of $8.3 million in transfer and recordation taxes to those states and to certain local jurisdictions within those states. Of this amount, approximately $6.3 million was paid to various Maryland jurisdictions,[2] and approximately $600,000 was paid to various Pennsylvania jurisdictions.[3] These Maryland and Pennsylvania jurisdictions are collectively referred to herein as the "Taxing Authorities."

Because the NVR plan of reorganization confirmed by the bankruptcy court on July 22, 1993 ("the Plan") is central to the disputes at bar, a brief description of its history and contents is in order. Initially, NVR had anticipated that its pre-petition debt could be restructured and retired over time. Its first plan of reorganization was based on this assumption. Yet, because the Bank Group members would not agree to any plan of reorganization

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[2] The Maryland jurisdictions include the circuit court clerks for Anne Arundel, Baltimore, Carroll, Harford, Howard, Montgomery, Prince George's, Frederick and Washington Counties. The clerks of all nine counties collect a state transfer tax, and all but the clerk of Prince George's County collect a state recordation tax. Only the clerks of Anne Arundel and Howard Counties collect a county transfer tax.

[3] The Pennsylvania jurisdictions include the Commonwealth itself, four townships (Hopewell, Hampton, Shaler, and Moon), one borough (Franklin Park), and five school districts (Hampton Township, Shaler Area, Moon Area, North Allegheny, and Seneca Valley).

that did not provide for expedited payment of their claims, NVR developed the Plan that was confirmed by the bankruptcy court, and which provided for a public debt offering sufficient to cover the debt to the Bank Group. Specifically, the Plan required the sale of Senior Notes "in such an amount as will provide the Debtors sufficient cash to pay the Allowed Class 2 Claims and Allowed Claims in other Classes that are to be paid in cash on the Effective Date." The Plan also provided for the cancellation of NVR's subordinated debt securities in exchange for the issuance of approximately 91.1% of the initially outstanding equity interests in NVR. Thus, under the Plan, NVR creditors holding notes and debentures would receive shares of NVR in return for the cancellation of their subordinated debt securities.

To facilitate its implementation, and pursuant to 11 U.S.C. § 1146(c), the Plan, in section 4.13, exempted NVR's issuance and exchange of these securities from state and local taxes. It also exempted from such taxes any transfer of NVR's property made "under, in furtherance of, or in connection with the Plan."[4] And, in confirming the Plan, the bankruptcy court incorporated this language in its order, and retained jurisdiction over the "interpretation or enforcement of the Plan."

The Taxing Authorities were served with copies of the proposed Plan and related papers because they were creditors of the estate for taxes unrelated to the transfer and recordation taxes at issue here. None of the Taxing Au-

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[4] Section 4.13 of the Plan provided in full, as follows:

> Pursuant to section 1146(c) of the Bankruptcy Code, the issuance, transfer, or exchange of securities pursuant to the Plan, and the transfer of, or creation of any lien on, any property of any Debtor under, in furtherance of, or in connection with the Plan shall not be subject to any stamp tax, real estate transfer tax, recordation tax, or similar tax.

thorities objected to the Plan, and, after the July 22, 1993 order confirming the Plan, none appealed, as they might have,[5] to the district court.

So far as the record reflects, the Plan was implemented without significant incident; the specified securities issued free from state and local taxation, the Bank Group members received payment of NVR's pre-petiton debt, the subordinated debt security holders received their equity interests in NVR, and NVR's debts were canceled. All of this was accomplished prior to September 30, 1993, at which time NVR emerged from its Chapter 11 bankruptcy. Importantly, throughout the period of bankruptcy —beginning April 6, 1992 with the filing of the petition, continuing through July 22, 1993 when the Plan was confirmed, and concluding September 30, 1993 when the Plan was fully implemented and the bankruptcy period ended—NVR continued to operate its business as a debtor in possession, buying property, constructing homes, and then selling the homes. NVR paid transfer and recordation taxes relating to these transactions to various state and local taxing jurisdictions.

Thereafter, during 1994-95, NVR, citing § 1146(c) and the Plan, sought refunds from the various jurisdictions. Some of the jurisdictions, namely Virginia, New York, Delaware, and North Carolina, and the local jurisdictions therein, refunded to NVR all of the taxes collected.[6] However, the state and local taxing authorities in Maryland and Pennsylvania were less obliging.

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[5] *See Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 782 (4th Cir. 1997).

[6] The refunds from these four states totaled approximately $1.2 million.

In response, NVR initiated a contested matter pursuant to Rule 9014, Fed. R. Bankr. P.[7], requesting a declaration that its real property transfers during the period from April 6, 1992 through September 30, 1993 were exempt from taxation under the provisions of the Plan and under 11 U.S.C. § 1146(c). Notice of the motion was served on the Taxing Authorities, all of whom responded by filing motions for abstention, or alternatively, for dismissal or summary judgment.[8] By order entered on April 4, 1996, the bankruptcy court granted NVR's motion, finding NVR's real property transfers from April 6, 1992 through September 30, 1993 to be exempt from transfer and recordation taxes under 11 U.S.C. § 1146(c).[9]

Shortly thereafter, the Taxing Authorities moved the bankruptcy court to reconsider its ruling in light of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 1996), in which the Supreme Court held that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the

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[7] Fed. R. Bankr. P. 9014 provides in pertinent part, that:

> In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion.

[8] The Taxing Authorities' motion to dismiss was based, in part, on their claim of Eleventh Amendment immunity. Although 11 U.S.C. § 106, as amended by the Bankruptcy Reform Act of 1994, expressly purports to abrogate the states' sovereign immunity for issues arising under, *inter alia*, § 1146(c), the Taxing Authorities challenged the provision as unconstitutional.

[9] Specifically, the bankruptcy court found that "the purchase of lots and the sale of lots and finished homes, were essential to the formulation, confirmation and consummation of the Confirmed Plan and to [NVR's] effective reorganization and emergence from bankruptcy, and thus fall within the tax exemption of 11 U.S.C. § 1146(c)."

constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73. In light of *Seminole Tribe*, the bankruptcy court granted the motion in part, holding that Congress' attempt to abrogate the states' Eleventh Amendment immunity through 11 U.S.C. § 106 was unconstitutional. *See In re NVR L.P.*, 206 B.R. 831, 843-44 (Bankr. E.D.Va. 1997).[10] And absent abrogation of the Taxing Authorities' sovereign immunity, the bankruptcy court further held that NVR's motion for a declaration of tax exemption was an impermissible "suit" against "arms of the State" for Eleventh Amendment purposes. *See id.* Accordingly, the bankruptcy court amended its April 4, 1996 order to make explicit that the order was not binding on the Commonwealth of Pennsylvania or the Maryland circuit court clerks in their role as collectors of the state transfer tax. *See id.* at 852-53.[11]

On appeal, the Taxing Authorities argue that NVR's post-petition, pre-confirmation transfers of real property are not entitled to an exemption from transfer and recordation taxes under 11 U.S.C. § 1146(c).[12] NVR disagrees,

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[10] The Fourth Circuit reached the same conclusion in *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1147 (4th Cir. 1997).

[11] The bankruptcy court concluded, however, that the local Pennsylvania jurisdictions, and the Maryland circuit court clerks in their roles as collectors of the state recordation tax and the county transfer tax, were without a basis for invoking the Eleventh Amendment, and that the April 4, 1996 order therefor remained binding as to these entities. *See id.* at 846-848.

[12] The Maryland jurisdictions raise two additional issues on appeal. They contend first that the Eleventh Amendment also bars application of the bankruptcy court's April 4, 1996 order to the Maryland circuit court clerks in their role as collectors of state recordation taxes. Second, they contend further that the order does not apply to the county transfer taxes collected by the clerks of Anne Arundel and Howard Counties because neither county received due process notice or an opportunity to be heard on NVR's motion.

of course, and also cross-appeals, contending that none of the Taxing Authorities have a basis to invoke Eleventh Amendment immunity because NVR's motion for a declaration construing § 1146(c) was not a "suit" against one of the United States.

II.

Findings of fact made by the bankruptcy court are reviewed for clear error. *See* Fed. R. Bankr. P. 8013; *In re Stanley*, 66 F.3d 664, 667 (4th Cir. 1995). And, in this regard, a finding of fact is deemed to be clearly erroneous when, although there is some evidence to support it, the revewing court, on the basis of all the evidence, is "left with the definite and firm conviction that a mistake has been committed." *See In re Varat Enters., Inc.*, 81 F.3d 1310, 1314 (4th Cir. 1996) (citing *In re Green*, 934 F.2d 568, 570 (4th Cir. 1991)). Review of the bankruptcy court's application of the law is, of course, *de novo*. *See In re Stanley*, 66 F.3d at 667.

III.

Analysis properly begins with the terms of section 1146(c), which provide that:

> The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

11 U.S.C. § 1146(c). The parties do not dispute that the NVR property transfers at issue here could fit well within this provision; thus the transfers involve the "delivery of an instrument of transfer," and the transfer and recordation taxes at issue here are "stamp tax[es] or similar tax[es]" within the meaning of § 1146(c). But the parties

do dispute whether, as the statute requires, the transfers were "under" the Plan. To resolve this dispute, reference must be made to section 4.13 of the Plan, which expressly exempts from state and local taxes "the transfer of . . . any property of any Debtor under, in furtherance of, or in connection with the Plan." The property transfers fit as well under this provision as under § 1146(c). As the bankruptcy court put it, the transfers were "essential to the formulation, confirmation and consummation of the Confirmed Plan," and clearly fall within the general terms of section 4.13. Hence, the transfers plainly fall "under [the] plan confirmed," within the terms of § 1146(c).

Against this conclusion, it may be argued that section 4.13 speaks in terms too general to accomplish NVR's purpose, that only specifically described matters in the Plan, like the public debt offering, qualify for the tax exemption. Of course, it is preferable in drafting a plan to identify the covered transactions with specificity so as to remove any doubt or ambiguity concerning the intended coverage of the plan and to provide reasonable notice of the plan's coverage to voting creditors and the bankruptcy court. Although the Plan in this instance is not as specific as it might have been,[13] it seems quite clear, given the nature of NVR's business, that the language of section 4.13 provided adequate notice to creditors and the bankruptcy court that real property transfers in the ordinary course of that business were covered by the Plan. Indeed, the bankruptcy court reached precisely this conclusion in its April 4, 1996 order, where it interpreted section 4.13 as covering "the transfers of real property by or to the

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[13] Thus, the Plan here might preferably have been drafted to exempt from taxation "the transfers of real property by or to the debtors, whether by purchase or sale, occurring in the ordinary course of the debtors' business during the period from April 6, 1992 through September 30, 1993."

Debtors, whether by purchase or sale, during the period from April 6, 1992 through September 30, 1993."

But this is not the end of the analysis, for many of the transactions occurred prior to the Plan's confirmation on July 22, 1993, and hence the question arises whether these earlier transactions, *i.e.*, those occurring between April 6, 1992 and June 22, 1993 can be said to be "under" the Plan. An affirmative answer to this question follows from the Plan itself, which includes no temporal limitations on covered transactions, and from the practicalities of the situation. As a practical matter, reorganization plans often concern or contemplate transactions that occur prior to the plan's confirmation. Thus, in the typical Chapter 11 case, if not in most such cases, the development, submission, and confirmation of a plan of reorganization is a process that is not usually completed until some time after the filing of the petition, during which period of time the debtor continues to operate. And it is often true that the business conducted during this post-petition, pre-confirmation period is essential to the success of both the plan of reorganization and the debtor's emergence from bankruptcy. Precisely this occurred here. As the bankruptcy court concluded, the post-petition, pre-confirmation property transfers here in issue enabled NVR to remain a viable operation and avoid liquidation.[14]

Thus, nothing in the language of the Plan nor in the statutory exemption itself restricts the application of § 1146(c) to transactions occurring after the Plan's confirmation. *See In re Lopez Dev., Inc.*, 154 B.R. 607

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14 Specifically, the transfers allowed NVR to reduce its pre-petition debt by more than $50 million prior to the Senior Notes offering. And, the revenues generated by these property transfers facilitated the $160 million public debt offering, which was a central precondition to the Plan's confirmation.

(Bankr. S.D. Fla. 1993) (applying § 1146(c) exemption to debtor's pre-confirmation transfers); *In re Baldwin League of Indep. Schools*, 110 B.R. 125 (S.D.N.Y. 1990) (same); *In re Smoss Enters. Corp.*, 54 B.R. 950 (E.D.N.Y. 1985) (same). And, because the real property transfers from April 6, 1992 through September 30, 1993 fall squarely "under" the Plan within the meaning of § 1146(c), the bankruptcy court properly held them exempt from taxation.

IV.

Despite finding the § 1146(c) exemption applicable to NVR's real property transfers, the bankruptcy court also held, after reconsideration, that it had no authority in its April 4, 1996 order to bind either the Commonwealth of Pennsylvania or the Maryland circuit court clerks as collectors of the state transfer tax, finding them immune from suit in federal court under the Eleventh Amendment. *See In re NVR*, 206 B.R. at 848. This result depends, of course, on the bankruptcy court's conclusion that NVR's initiation of the contested matter under Fed. R. Bankr. P. 9014 constituted a "suit" against the Taxing Authorities within the meaning of the Eleventh Amendment. *See id.* at 843-44.[15] If, as NVR contends, its motion was not a suit filed "against one of the United States," then notwithstanding the result in *Seminole Tribe*, an Eleventh Amendment defense is not applicable here. If, on the other hand, NVR's motion was a suit for Eleventh Amendment purposes, then the bankruptcy court correctly restricted the binding effect of its April 4, 1996 order to less than all of the Taxing Authorities.

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[15] As the Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any *suit in law or equity*, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (emphasis added).

A review of this contested matter, *i.e.*, NVR's motion for a declaration that its real property transfers were exempt from taxation, reveals that the proceeding lacked the fundamental attributes that commonly identify a "suit." Specifically, none of the Taxing Authorities were named as defendants, nor were they served with process mandating that they appear in a federal court. *See Antonelli Creditors'*, 123 F.3d at 786; *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 407-412 (1821) (a suit entails demanding something by the institution of process that compels the attendance of the parties subject to the demand). The Taxing Authorities were served with notice of NVR's motion in accordance with the rules governing the initiation of a contested matter. *See* Fed. R. Bankr. P. 9014. Nevertheless, while they were free to appear and to challenge NVR's motion, as they did, they were equally free to refrain from doing so.[16] Clearly then, the instant case is distinguishable from the one in which "a debtor, a trustee or other private person files an adversary action against the state in the bankruptcy court, causing the bankruptcy court to issue process summonsing the state to appear." *Antonelli Creditors'*, 123 F.3d at 786-87.

Essentially, NVR's motion requested that the bankruptcy court, pursuant to its retained jurisdiction over the Plan, enter an order clarifving the intended coverage of the Plan's exemption provision. In doing so, the bankruptcy court merely provided, with its April 4, 1996 order, the specificity that could, and indeed should, have been provided within section 4.13 of the Plan itself. Moreover, the bankruptcy court's authority to enter the April 4 order, like its authority to enter the confirmation

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16 While Rule 9014 requires that the party against whom relief is sought receive "reasonable notice and opportunity for hearing," the rule itself requires no response. *See* Fed. R. Bankr. P. 9014.

order, derived not from its jurisdiction over the Commonwealth of Pennsylvania, or any of the Maryland circuit court clerks,[17] but rather from its continued jurisdiction over NVR and the Plan. *See Antonelli Creditors'*, 123 F.3d at 787.[18] Thus, the Taxing Authorities' immunity from "suit" was no obstacle to the bankruptcy court's power to declare, pursuant to Rule 3020(d), certain real property transfers exempt from taxation under § 1146(c) and the Plan.[19]

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17 The service of a Rule 9014 motion, unlike the service of a summons and complaint, does not confer personal jurisdiction over the party served, but simply informs that party of the nature of the motion and the relief requested. *See In re Antell*, 155 B.R. 921, 931 (Bankr. E.D.Pa. 1992); *but see In re Laughlin*, 210 B.R. 659, 661 (B.A.P. 1st Cir 1997) Just as reasonable notice must be provided to creditors before a bankruptcy court may confirm a Chapter 11 plan, *see* 11 U.S.C. § 1128(a), Rule 9014's notice requirement must be satisfied before a bankruptcy court may grant the relief requested in a contested matter, which in this instance was only a clarification of a Plan.

18 Specifically, the bankruptcy court entered the April 4 order pursuant to Fed. R. Bankr. P. 3020(d), which provides that "[n]otwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate." And beyond this, the bankruptcy court's confirmation order itself included an express reservation of jurisdiction to construe terms of the Plan. Even absent such an express reservation of jurisdiction, bankruptcy courts retain, under 11 U.S.C. § 1142, post-confirmation authority over matters concerning the execution, implementation, and interpretation of a confirmed plan. *See Goodman v. Phillip R. Curtis Enters., Inc.*, 809 F.2d 228, 232 (4th Cir. 1987); *In re Leeds Bldg. Prods., Inc.*, 160 B.R. 689, 691 (Bankr. N.D.Ga. 1993).

19 In this regard, NVR's motion is distinguishable from a declaratory judgment action brought pursuant to 28 U.S.C. § 2201, where a court's discretion to grant the requested declaratory relief depends on its jurisdiction over a potentially unconsenting defendant. Thus, while a declaratory judgment action under § 2201 would be inappropriate against the Taxing Authorities because the relief requested would be tantamount to a money juudgment against an unconsenting state, *see Green v. Mansour*, 474 U.S. 64, 73-74

Accordingly, because NVR's initiation of the contested matter in the instant case was not a suit "against one of the United States," an Eleventh Amendment defense is not available to any of the Taxing Authorities.

IV.

For the foregoing reasons, the decision of the bankruptcy court declaring NVR's real property transfers from April 6, 1992 through September 30, 1993, exempt from transfer and recordation taxes is affirmed. Its subsequent finding that NVR's motion for a declaration of tax exemption constituted a "suit" such that the Commonwealth of Pennsylvania and the Maryland circuit court clerks as collectors of state transfer taxes were entitled to Eleventh Amendment immunity is reversed.

Neither reached nor decided here is the question whether the bankruptcy court's April 4 order is binding in any way on the Taxing Authorities. That question is appropriately left to the court or state agency to which NVR must apply for a refund.[20]

(1985), this general prohibition is inapposite to NVR's motion here at issue.

[20] It is worth noting that the Maryland circuit court clerks also contend on appeal that the bankruptcy court's April 4, 1996 order does not apply to the county transfer taxes collected by the clerks of Anne Arundel and Howard Counties because neither county received due process notice or an opportunity to be heard on NVR's motion. This contention is unpersuasive. For due process purposes, the binding effect of bankruptcy court orders depends on whether the interested parties receive notice "reasonably calculated under all the circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections." *Antonelli Creditors'*, 123 F.3d at 783 (quoting *Mullane v. Central Hanover Bank and Trust*, 339 U.S. 306, 314 (1950)). Such notice was provided here, as notice of the motion was served on the county circuit court clerks. In any event, as noted here, NVR requested,

An appropriate order shall issue.

/s/ T S. Ellis, III
T.S. ELLIS, III
United States District Judge

Alexandria, Virginia
July 17, 1998

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and received, from the bankruptcy court nothing more than an order clarifying that the Plan, by its terms and pursuant to § 1146(c), exempted its real property transfers from transfer and recordation taxes. As noted, whether this order is binding on Anne Arundel and Howard Counties in a separate proceeding by NVR for a refund of the county transfer taxes is best left to the court or administrative agency that will preside over such a proceeding.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. No. 97-1238-A

CLERK OF THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY, MARYLAND, *et al.*,
Appellants,

v.

NVR HOMES, INC.,
Appellee/Cross-Appellant.

ORDER

This matter came before the Court on cross-appeals of a final order entered by the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division.

For the reasons set forth in the accompanying Memorandum Opinion, the judgment of the bankruptcy court is AFFIRMED in part and REVERSED in part. Specifically, the judgment is affirmed to the extent that it found the transfers of real property by or to the debtors from April 6, 1992 through September 30, 1993 exempt from transfer and recordation taxes pursuant to 11 U.S.C. § 1146(c). The judgment is reversed to the extent that it found that NVR's motion constituted a "suit," thereby entitling the Commonwealth of Pennsylvania and the Maryland circuit court clerks as collectors of state transfer taxes to Eleventh Amendment immunity.

Accordingly, this case is REMANDED for further proceedings consistent with the Memorandum Opinion, including vacation of that portion of the bankruptcy court's March 25, 1997 order that grants in part appellants' motion to reconsider based on the Eleventh Amendment immunity of the Commonwealth of Pennsylvania and the Maryland circuit court clerks as collectors of state transfer taxes.

The Clerk is directed to send copies of this Order to all counsel of record.

United States District Judge

/s/ T.S. Ellis, III
T.S. Ellis, III

Alexandria, Virginia
July 17, 1998

APPENDIX D

[Filed Mar. 14, 1997]

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

Case No. 92-11704-T
(Jointly Administered)

IN RE NVR L.P., *et al.*,
Debtors-in-Possession

MEMORANDUM OPINION

On October 23, 1995, the debtors-in-possession in these consolidated Chapter 11 cases moved the court to construe a section of their confirmed plan as requiring taxing authorities in Pennsylvania and Maryland to refund certain real property transfer and recordation taxes. On April 4, 1996, the court entered a declaratory judgment order under Fed. R. Bankr. P. 3020(d) granting the debtors' motion. Just days before, however, the Supreme Court had held in *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996), that Congress cannot abrogate a state's Eleventh Amendment immunity when exercising its powers under Article I of the Constitution.

In light of the Supreme Court's decision, the taxing authorities filed motions asking this court to reconsider and to amend the April 4, 1996, order on the ground that *Seminole* has rendered 11 U.S.C. § 106 [1] unconstitu-

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1 Section 106 of the Bankruptcy Code consists of three subsections. In § 106(a), Congress abrogated the sovereign immunity of all governmental units with respect to certain sections of the Bank-

tional and that the court therefore lacked jurisdiction to enter the declaratory judgment against them. The court held a hearing on these motions on September 18, 1996, and then took the matter under advisement. On December 9, 1996, the United States Department of Justice obtained leave to intervene in this proceeding and to lodge its support for the constitutionality of § 106.

For the reasons set forth in this memorandum opinion, the court holds that § 106 of the Bankruptcy Code is unconsitutional and that the Eleventh Amendment precludes this court's order of April 4, 1996, from binding the Commonwealth of Pennsylvania and the Maryland circuit court clerks as collectors of a state transfer tax. Accordingly, the motions of these authorities to reconsider and to amend the order must be granted.

Findings of Fact and Procedural History

The debtors [2] have built and financed new homes in Northern Virginia and the Maryland suburbs of Washington, D.C., for well over ten years. When the real estate

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ruptcy Code. In § 106(b), Congress declared that a governmental unit which files a proof of claim will be deemed to have waived its sovereign immunity with respect to a claim "that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." In § 106(c), Congress authorized the estate to offset any claim it may have against the governmental unit notwithstanding a claim of sovereign immunity.

[2] The debtors who filed Chapter 11 petitions include NVR Limited Partnership (Case No. 92-11704), NVHomes Limited Partnership (Case No. 92-11705), Ryan Operations General Partnership (Case No. 92-11706), Ryan Homes, Inc. (Case No. 92-11707), NVHomes Holding Limited Partnership (Case No. 92-11708), NVHolding, Inc. (Case No. 92-11709), Ryan General Partnership (Case No. 92-11710), NVHomes II Limited Partnership (Case No. 92-11711), NVCompanies, Inc. (Case No. 92-11712), Ryan Financial Services, Inc. (92-15740), and NVR Mortgage Limited Partnership (Case No. 92-15741).

market crumbled in the late 1980s, however, their once prosperous business suffered a bitter collapse. In the face of mounting financial pressure, the debtors were forced not only to implement an operational overhaul but to initiate negotiations with their bank group on a proposed restructuring of their working capital facilities. Even though the debtors prepared a detailed plan for reorganization, several of the banks balked at the idea of continuing to fund the enterprise. As a result, the debtors filed for relief under Chapter 11 of the Bankruptcy Code on April 6, 1992.[3]

On July 22, 1993, the court confirmed the debtors' second amended joint plan of reorganization. Section 4.13 of the plan provided, in pertinent part, that:

> [p]ursuant to section 1146(c) of the Bankruptcy Code, the issuance, transfer, or exchange of securities pursuant to the Plan, and the transfer of, or creation of any lien on, any property of any Debtor under, in furtherance of, or in connection with the Plan shall not be subject to any stamp tax, real estate transfer tax, recordation tax, or similar tax.

The court's order of confirmation, which incorporated the thrust of this language, retained jurisdiction over the "interpretation or enforcement of the Plan."

In the summer of 1995, local and state taxing authorities in Maryland [4] and Pennsylvania [5] refused the debtors'

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[3] At present, the court is jointly administering all the cases.

[4] The Maryland taxing authorities include the circuit court clerks for Anne Arundel, Baltimore, Carroll, Harford, Howard, Montgomery, Prince George's, Frederick, and Washington Counties. The clerks of all nine counties collect a state transfer tax, and all but the clerk of Prince George's County collect a state recordation tax. Only the clerks of Anne Arundel and Howard Counties collect a county transfer tax.

[5] The Pennsylvania taxing authorities include the Commonwealth itself, four townships (Hopewell, Hampton, Shaler, and Moon), one

request for a refund of transfer and recordation taxes collected on the debtors' post-petition, pre-confirmation transfers of real property. In October, the debtors[6] moved this court for a declaratory judgment fixing their rights under Section 4.13 of the plan. On April 4, 1996, the court entered an order concluding that the pre-confirmation transfers "were essential to the formulation, confirmation and consummation of the Confirmed Plan and to Debtors' effective reorganization and emergence from bankruptcy . . . ." The order consequently declared that all real property transfers made between April 6, 1992, and September 30, 1993, were exempt from transfer and recordation taxes pursuant to 11 U.S.C. § 1146(c).[7]

Just days before the court's order, the United States Supreme Court had handed down its opinion in *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996). In *Seminole*, the Court considered whether Congress, by enacting the Indian Gaming Regulatory Act, had rightfully abrogated the states' immunity under the Eleventh Amendment.[8] Up until that time, only two provisions of the Constitution had been construed as bestowing upon

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borough (Franklin Park), and five school districts (Hampton Township, Shaler Area, Moon Area, North Allegheny, and Seneca Valley).

6 In fact, only NVR Homes, Inc.—the successor in interest to NVHomes Limited Partnership and Ryan Operations General Partnership—proffered the motion. For ease of reading, however, I will refer throughout this opinion to the debtors collectively.

7 Section 1146(c) states: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument or transfer under a plan confirmed under section 1129 of this title may not be taxed under any law imposing a stamp tax or similar tax."

8 The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Congress a power to do so. In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-456 (1976), the Court "recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution." [9] *Seminole*, 116 S. Ct. at 1125. This being the case, § 5 of the Fourteenth Amendment was interpreted as one means by which Congress could abrogate the immunity from suit guaranteed by the Eleventh Amendment. *Seminole*, 116 S. Ct. at 1125.

In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality of the Court construed a second provision of the Constitution as empowering congressional abrogation. Noting that it "would be difficult to overstate the breadth and depth of the commerce power," four Justices reaffirmed that the Interstate Commerce Clause "displaces state authority even where Congress has chosen not to act." *Id.* at 20. Against this backdrop, the plurality held that Congress enjoyed a prerogative to abrogate when legislating pursuant to Art. I, § 8, cl. 3 of the Constitution. *Id.* at 19. Justice White, who provided the fifth vote, wrote separately to indicate that, while he agreed that "Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States," he could not concur with "much of [the plurality's] reasoning." *Id.* at 57 (White, J., concurring in part and dissenting in part).

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[9] The relevant portions of the Fourteenth Amendment read:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

The Court in *Seminole* observed that, "[s]ince it was issued, *Union Gas* has created confusion among the lower courts that have sought to understand and apply the deeply fractured reasoning." *Seminole*, 116 S. Ct. at 1127. Moreover, the Court found the plurality's rationale to have "deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in [*Hans v. Louisiana*, 134 U.S. 1 (1890)]." *Id.* With the dissent making no effort to defend the decision, the majority felt "bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled." *Id.* at 1128. In doing so, the Court announced that, even when Article I of the Constitution "vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* at 131.

In light of *Seminole*, the taxing authorities moved this court to reconsider and to amend the April 4, 1996, order. In essence, they maintain that the Supreme Court's decision renders 11 U.S.C. § 106 an unconstitutional bid by Congress to abrogate the several states' immunity under the Eleventh Amendment.[10] If the stance has merit,

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10 Section 106 of the Code possesses a most tumultuous history. *See* S. Elizabeth Gibson, *Congressional Response to Hoffman and Nordic Village: Amended Section 106 and Sovereign Immunity*, 69 Am. Bankr. L.J. 311 (1995). The Bankruptcy Act of 1898 had made no mention of sovereign immunity or the Act's applicability to government entities. The Bankruptcy Reform Act of 1978, in an effort to fill this void, codified at § 106 a provision which sought to treat these entities much like any other private party. The Supreme Court frustrated this endeavor, however, in *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989), and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992). In these two cases, the Court "held that Congress [had] failed to speak with sufficient clarity in [former] § 106(c) to overcome the states' and federal government's sovereign immunity from suits for monetary relief." Gibson, *supra*, at 312. Not to be outdone, Congress enacted

this court would have lacked the requisite jurisdiction to issue a declaratory judgment binding on the taxing authorities. The debtors of course take issue with this position and respond with several arguments: (1) that extending *Seminole*'s reach to § 106 abridges the debtor's privileges and immunities and denies the debtors equal protection of the laws under the Fourteenth Amendment; (2) that their motion for declaratory judgment does not constitute a "suit" under the Eleventh Amendment; (3) that the circuit court clerks, townships, school districts, and other local taxing authorities have no immunity under the Eleventh Amendment; and (4) that the taxing authorities waived their Eleventh Amendment immunity.[11]

Discussion and Conclusions of Law

I.

The court first must determine the effect of *Seminole* on § 106 of the Bankruptcy Code. In particular, the court must ascertain whether any part of the section remains constitutionally viable in the wake of the Supreme Court's decision.[12] Since *Seminole* stands for the

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the Bankruptcy Reform Act of 1994 and amended § 106 with the express purpose of overruling both *Hoffman* and *Nordic Village*. *See* H.R. Rep. No. 103-835, at 42 (1994). The Supreme Court now has responded with *Seminole*, throwing the future of § 106 into doubt once again.

11 The United States Department of Justice, by leave of the court, has intervened in this matter to lodge its support for the constitutionality of § 106. Its memorandum of law, however, offers no ground for upholding the provision other than those already espoused by the debtors.

12 Of course, the Supreme Court long has held that "it is not on slight implication and vague conjecture that the legislature is pronounced to have transcended its powers, and its acts to be considered as void." *Fletcher v. Peck*, 6 Cranch (10 U.S.) 87, 128 (1810). *See also Concrete Pipe & Prods. of Cal., Inc. v. Construc-*

idea that no clause in Article I bestows upon Congress the power to abrogate a state's Eleventh Amendment immunity, the inquiry will focus on the end Congress envisioned when enacting each subsection in § 106.[13] If Congress sought in any subsection to abrogate the immunity from suit secured by the Eleventh Amendment, *Seminole* instructs the court to declare it to be an unconstitutional exercise of the Article I power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., art. I, § 8, cl. 4.

The authority to abrogate "means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). With this principle in mind, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment." *Id.* at 243. Congress therefore must "express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Id.* Only with such an unequivocal expression will the courts choose to expand their own jurisdiction and to realign the balance envisioned by the Framers. *Id. See also Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989).

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tion Laborers Pension Trust for S. Cal., 508 U.S. 602, 637 (1993) (reaffirming that "legislative Acts . . . come to the Court with a presumption of constitutionality'").

13 When considering whether Congress has rightfully abrogated a state's constitutional immunity, a court must answer two questions: (1) whether Congress has unequivocally expressed an intent to do so, and (2) whether Congress has acted pursuant to a valid exercise of power. *Seminole*, 116 S. Ct. at 1123. Since *Seminole* already has settled the second issue, as it relates to *any* power established under Article I of the Constitution, I need only consider the first.

Without question, § 106(a)[14] manifests the requisite intent to abrogate. As indicated in a footnote above, Congress enacted this subsection in response to the Supreme Court's decision in *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989). In *Hoffman*, the Court had held that former § 106(c)[15] did not

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14 Section 106(a) provides:

> Notwithstanding any assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.
>
> (4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.
>
> (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

15 Prior to the Bankruptcy Reform Act of 1994, § 106(c) provided:

act to abrogate the states' Eleventh Amendment immunity. The narrow scope of the waivers in former subsections (a),[16] (b),[17] and (c)(2) had persuaded the Court that Congress had not intended former subsection (c)(1) as a broad abrogation. *Id.* at 101-02. Revised § 106(a), in contrast, resolves any ambiguity with its rather unequivocal language: "Notwithstanding any assertion of sovereign immunity, sovereign immunity is abrogated as to a government unit to the extent set forth in this section. . . ." 11 U.S.C. § 106(a). Since Congress thus intended in § 106(a) to abrogate the states' Eleventh Amendment immunity, the holding in *Seminole* requires this court to find it unconstitutional.[18]

> Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains "creditor," "entity," or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

[16] Former § 106(a) provided: "A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose."

[17] Former § 106(b) provided: "There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate."

[18] Since *Seminole*, the vast majority of courts have agreed that "the Bankruptcy Clause in Article I does not authorize Congress to abrogate state sovereign immunity and, specifically, that the Bankruptcy Clause did not authorize Congress to abrogate state sovereign immunity under 11 U.S.C. § 106(a)." *See Sparkman v. State of Fla. Dep't of Rev. (In re York-Hanover Devs., Inc.)*, 201 B.R. 137, 141 (Bankr. E.D.N.C. 1996) (listing the cases in which courts have so ruled)

The purpose of §§ 106(b)[19] and (c)[20] cannot be ascertained so easily. The Court in *Hoffman* referred to their predecessors as "waivers." *Hoffman*, 492 U.S. at 101. The Seventh Circuit has indicated that those prior subsections concerned "cases in which a state, by filing a proof of claim, consents to have claims adjudicated by the bankruptcy court." *McVey Trucking, Inc. v. Secretary of State of Ill. (In re McVey Trucking, Inc.)*, 812 F.2d 311, 327 (7th Cir. 1987), *cert. denied*, 484 U.S. 895 (1987). Indeed, the court in *McVey Trucking* suggested that the difference between former subsections (a) and (b) and former subsection (c) could be "conceptualized as the difference between state voluntary 'waiver' of immunity and congressional 'abrogation' or 'forced waiver' of immunity." *Id.* at 327 n.9.

In sum, these decisions seem to hint that revised §§ 106(b) and (c) would be better deemed provisions for waiver rather than efforts at congressional abrogation. The subject for any waiver, however, must be the state rather than Congress. In other words, while Congress may "abrogate," only a state may "waive" its Eleventh Amendment immunity. It is simply impossible for Congress, through these subsections, to have served as a proxy for the states and dictated those circumstances in which the states would "waive" their prerogative under the Amendment.

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19 Revised § 106(b) provides: "A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose."

20 Revised § 106(c) provides: "Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate."

In addition, the subsections cannot be read as merely fixing the test for any waiver by the states. Congress cannot alter the jurisprudence undergirding a provision of the Constitution any more than it, acting alone, can amend the Constitution itself. "One of the oldest principles of constitutional law holds that the judiciary's powers are quantitatively different when a controversy requires a judge to interpret and give effect to the Constitution. Courts do not allow 'statutory limitations' to block the enforcement of the Constitution." *Aguayo v. Christopher*, 865 F. Supp. 479, 487 (E.D. Ill. 1994) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Since "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury*, 5 U.S. (1 Cranch) at 177, Congress cannot dictate to the judiciary the standard for assessing whether a state has waived its Eleventh Amendment immunity. This begins and ends as a matter of constitutional interpretation.

Therefore, insofar as Congress undertook in revised §§ 106(b) and (c) to displace or to modify the meaning ascribed to the Eleventh Amendment by the courts, its endeavor must be deemed an attempted abrogation of the states' constitutional immunity. *See AER-Aerotron, Inc. v. Texas Dep't of Transp.*, 104 F.3d 677, 681 (4th Cir. 1997) (recognizing that "the power to define waiver can become the functional equivalent of the power to abrogate"). To this extent, then, revised §§ 106(b) and (c) must fall with revised § 106(a). Specifically, where Congress sought to limit the reach of the Eleventh Amendment by exercising its power under the Bankruptcy Clause, *Seminole* renders the attempt unconstitutional[21]

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21 At least one court in the post-*Seminole* era has ruled to the contrary, finding §§ 106(b) and (c) to constitute lawful instances of "forced waiver" rather than unconstitutional congressional ab-

II.

Notwithstanding the sweeping changes made by *Seminole*, the Supreme Court did reaffirm that, "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." *Seminole*, 116 S. Ct. at 1125. In this vein, the debtors insist that Congress enacted § 106 of the Bankruptcy Code not under the authority vested by the Bankruptcy Clause but pursuant to § 5 of the Fourteenth Amendment.

A.

The debtors cite *Mather v. Oklahoma Employment Sec. Comm'n (In re Southern Star Foods, Inc.)*, 190 B.R. 419 (Bankr. E.D. Okl. 1995), as their primary authority.[22] In *Southern Star Foods*, the Chapter 7 trustee had endeavored to recover an allegedly unauthorized post-petition transfer of sale proceeds to the Oklahoma Employment Security Commission. The OESC, in a preview

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rogation. *See Ossen v. Connecticut Dep't of Social Servs. (In re Charter Oak Assocs.)*, 203 B.R. 17, 21-22 (Bankr. D. Conn. 1996). The opinion, however, offered little insight into the reason for this election, and I therefore will not follow it.

22 Several bankruptcy courts recently have considered this theory that § 106 was enacted under the auspice of the Fourteenth Amendment. Most, at least implicitly, have rejected the idea. *See, e.g., Tri-City Turf Club, Inc. v. Kentucky Racing Comm'n (In re Tri-City Turf Club, Inc.)*, 203 B.R. 617, 620 (Bankr. E.D. Ky. 1996); *Ellenberg v. Board of Regents of the Univ. Sys. of Ga. (In re Midland Mechanical Contractors, Inc.)*, 200 B.R. 453, 457-58(Bankr. N.D. Ga. 1996); *California Target Enters., Inc. v. California State Water Resources Control Bd. (In re Lazar)*, 200 B.R. 358, 382 (Bankr. C.D. Cal. 1996). At least one court, however, has latched on to *Southern Star Foods* in upholding the constitutionality of § 106. *See Headrick v. Georgia (In re Headrick)*, 200 B.R. 963, 967 (Bankr. S.D. Ga. 1996).

of the *Seminole* debate, argued that Congress lacked the power to abrogate the State of Oklahoma's immunity when exercising its authority under Article I. As a consequence, the OESC believed that § 106 of the Code could be constitutional only if Congress had enacted it into law pursuant to § 5 of the Fourteenth Amendment. In a lengthy historical discussion, the bankruptcy court held that Congress had done just that.

The court reasoned that nearly all legislation passed by Congress under Article I of the Constitution implicates the privileges and immunities of the citizens of the United States, their right not to be denied life or liberty or property without due process of law, or their entitlement to equal protection under the laws. In other words "[a]lthough such laws are enacted 'pursuant to Article I,' they are enforceable 'through the Fourteenth Amendment.'" *In re Southern Star Foods, Inc.*, 190 B.R. at 426. The court explicitly refused to "separate the power of national enactment under Article I from the power of national enforcement under the Fourteenth Amendment" or "to take what should be considered as a working whole, and dismember it into a matter of lifeless parts." *Id.* As a consequence, the court held that Congress had constitutionally abrogated the several states' Eleventh Amendment immunity by enacting § 106 of the Code.

It is true that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). In particular, the Supreme Court has held that Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection'" when legislating under the authority granted by that Amendment. *Equal Employment Opportunity Comm'n v. Wyoming*, 460 U.S. 226, 243 n.18

(1983). Nevertheless, "[b]ecause such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, [courts] should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981).

Most courts since *Seminole* have refused to follow the rationale of *Southern Star Foods*. Their concerns have been stated most succinctly by the Sixth Circuit Court of Appeals: "If we were to say that an act is valid if it is rationally related to achieving equal protection of the laws, then § 5 becomes a license to Congress to pass any sort of legislation whatsoever." *Wilson-Jones v. Caviness*, 99 F.3d 203, 209 (6th Cir. 1996). For this reason, courts have held that, "if Congress does not explicitly identify the source of its power under the Fourteenth Amendment, there must be something about the act connecting it to recognized Fourteenth Amendment aims," specifically, those concerned with "discrimination by state actors on the basis of race or gender." *Id.* at 210; *see also Taylor v. Virginia Dep't of Transp.*, 1996 WL 736954, *7 (E.D. Va. Dec. 18, 1996).

Having searched both the text and the legislative history of the Bankruptcy Code, this court is unable "to discern some legislative purpose or factual predicate" that supports, particularly in the context of § 106, an exercise of the power granted Congress by § 5 of the Fourteenth Amendment. *See Equal Employment Opportunity Comm'n*, 460 U.S. at 243 n.18 (1983). In fact, I can find no meaningful reference to the Amendment in the legislative comments accompanying any significant piece of bankruptcy legislation since 1978. In contrast, the Bankruptcy Clause often has been cited as the authority

by which Congress enacted some revision to the bankruptcy laws. *See, e.g., Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong. 164-67 (1975) (statement of Frank R. Kennedy, Professor, Univ. of Mich. Law Sch.) (defining a "uniform system" of bankruptcy and addressing the limits which it imposes on Congress); *Bankruptcy Reform Act: Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Mach. of the Senate Comm. on the Judiciary*, 94th Cong. 499-500 (1975) (statement of Joseph Patchen, attorney) (noting that the "only basis for [municipal rehabilitation] to be effective at all is via the bankruptcy clause of the Constitution" and that "[s]o whether you call it bankruptcy, or a rose, or any other name, you must use the bankruptcy clause"); H.R. Rep. No. 95-595, at 47 (1977) (concluding that "[t]here appears to be no reason why Congress cannot in the exercise of its power under the Bankruptcy Clause of the Constitution confer jurisdiction over all litigation having a significant connection with bankruptcy"); *Bankruptcy Amendments Act of 1993: Hearings on S. 540 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 103d Cong. 276 (statement of the American Bankers Association) (stating that "Congress' authority to create the trustee system derived not only from the bankruptcy clause of the Constitution, but also from Congress' Article I authority over the federal court system").

Moreover, nothing in the Bankruptcy Code appears to link the uniform law on bankruptcy to those traditional aims advanced by the Fourteenth Amendment. In the eight chapters which embody the Code, Congress devoted only one section to protecting debtors from discriminatory

treatment. *See* 11 U.S.C. § 525. Even here, however, the statute prohibits only that discrimination based upon an individual having filed for bankruptcy. No mention is made of either race or gender, the "two central evils" which the Fourteenth Amendment was designed to eliminate. *Wilson-Jones*, 99 F.3d at 210.

B.

Notwithstanding the absence of a connection between the Bankruptcy Code as statutory law and § 5 of the Fourteenth Amendment, both the debtors and the United States Department of Justice have suggested that bankruptcy as a concept constitutes a "privilege or immunity" under § 1 of this Amendment.[23] In *Twining v. New Jersey*, 211 U.S. 78, 97 (1908), the Supreme Court listed the privileges and immunities which by then had been recognized by the judiciary: (1) the right to pass freely from state to state, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867); (2) the right to petition Congress for redress of grievances, *United States v. Cruikshank*, 92 U.S. 542 (1876); (3) the right to vote for national officers, *Ku Klux Cases*, 110 U.S. 651 (1884); (4) the right to enter the public lands, *United States v. Waddell*, 112 U.S. 76 (1884); (5) the right to be protected against violence while in the lawful custody of a United States Marshall, *Logan v. United States*, 144 U.S. 263 (1892); and (6) the right to inform United States authorities of any violation of its laws, *In re Quarles*, 158 U.S. 532 (1895). *See also Carr v. Axelrod*, 798 F. Supp. 168, 172 n.1

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[23] The judiciary has recognized that the "privileges and immunities of national citizenship do not . . . encompass the right to have a federal question heard in a federal forum." *Carr v. Axelrod*, 798 F. Supp. 168, 172 (S.D.N.Y. 1992), *aff'd*, 996 F.2d 302 (2d Cir. 1993), *cert. denied*, 510 U.S. 931 (1993). Therefore, in order for this court even to consider invoking the Privileges and Immunities Clause as a means by which to uphold § 106 of the Code, bankruptcy itself must deemed a "privilege or immunity."

(S.D.N.Y. 1992), *aff'd*, 996 F.2d 302 (2d Cir. 1993), *cert. denied*, 510 U.S. 931 (1993); Laurence H. Tribe, *American Constitutional Law* § 7-4, at 555-56 (2d ed. 1988). The Court in *Twining* had neglected, however, to mention *Crutcher v. Kentucky*, 141 U.S. 47 (1891), which had established the right to carry on interstate commerce. *See* Tribe, *supra*, at 556. In addition since 1908, one other right has been added to the *Twining* list. In *Oyama v. California*, 332 U.S. 633 (1948), the Court acknowledged as a constitutional privilege the right under 42 U.S.C. § 1982 to take and to hold real property. *See* Tribe, *supra*, at 556.

The relative dearth of jurisprudence surrounding the Privileges and Immunities Clause owes much to the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873), in which the Supreme Court found that the Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *See Lilley v. Missouri*, 920 F. Supp. 1035, 1044 (E.D. Mo. 1996) (reaffirming that the Clause "has been narrowly interpreted to protect only uniquely federal rights"). Having thus removed from the purview of the Privileges and Immunities Clause any civil liberty traditionally associated with state protection, the Court in subsequent years relied almost exclusively on the Due Process Clause as the source of unenumerated constitutional rights. *See Lochner v. New York*, 198 U.S. 45 (1905) (introducing the concept of "substantive" due process of law). As a result, the Privileges and Immunities Clause has "remained essentially moribund." *Lutz v. City of York, Pa.*, 899 F.2d 255, 264 (3d Cir. 1990).

Against such a backdrop, this court can conceive of no ground which might warrant the "discovery" of a bankruptcy privilege in the Fourteenth Amendment. Although the United States Department of Justice has referred to

the right to obtain a fresh start" as belonging to the national citizenry, United States' Mem. of Law at 14, no authority has been cited as elevating that right to constitutional status. Indeed, the Supreme Court has explicitly declined to do so. In *United States v. Kras,* 409 U.S. 434 (1973), a petitioner had sought leave to file for bankruptcy in *forma pauperis.* The Court observed that "[b]ankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental." *Id.* at 446. Put more bluntly, "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy." *Id.* This blanket ruling, combined with the judiciary having abandoned the Privileges and Immunities Clause as a vehicle by which to guarantee unenumerated rights under the Constitution, convinces the court that the argument advanced by the debtors and the United States Department of Justice must be rejected.

C.

The last point pressed by the debtors implicates the Equal Protection Clause of the Fourteenth Amendment. Again citing the bankruptcy court in *Southern Star Foods,* they contend that the bankruptcy laws cannot be uniformly enforced if § 106 should fall. I do not agree, however, with the Oklahoma bankruptcy court's effort to inextricably intertwine Congress' authority to enact a law pursuant to Article I and the right of a private party to enforce that law in a federal forum. On its face, the undertaking is contrary to both the principle of parity and the respect which the federal judiciary should accord to state courts. *See Mondou v. New York, New Haven, & Hartford R.R. Co.,* 223 U.S. 1, 58-59 (1912). In any event, just as a disagreement between the circuits on the

interpretation of a statute does not violate the Equal Protection Clause, *see Hawkins v. Agricultural Marketing Serv.*, 10 F.3d 1125, 1131-32 (5th Cir. 1993), so the Fourteenth Amendment does not "assure uniformity or the absolute correctness of state court rulings," *Brosten v. Scheeler*, 360 F. Supp. 608, 613 (N.D. Ill. 1973), *aff'd*, 495 F.2d 1375 (7th Cir. 1974); *see also Beck v. Washington*, 369 U.S. 541, 554-55 (1962).

It nevertheless must be acknowledged that *Seminole*, possibly with little foresight,[24] may have made the Bankruptcy Code far more cumbersome and difficult to enforce.[25] The decision, however, does not deny debtors or

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[24] Justice Stevens, in his dissent in *Seminole*, worried that the majority's decision "prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy." *Seminole*, 116 S. Ct. at 1134 (Stevens, J., dissenting). The majority responded in a footnote that Justice Steven's concern was "exaggerated both in its substance and in its significance." *Seminole*, 116 S. Ct. at 1131 n.16. "Although the copyright and bankruptcy laws have existed practically since our nation's inception, and the antitrust laws have been in force for over a century, there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States." *Id.* The majority, however, apparently overlooked its decision just seven years before in *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989), in which a chapter 7 trustee had brought an action in a federal bankruptcy court seeking the turnover of funds held by the State of Connecticut. In any event, this case, as well as the hundreds like it across the nation, evince the flaw in the majority's prediction.

[25] In *Gardner v. New Jersey*, 329 U.S. 565 (1947), a trustee had submitted to the "reorganization court" a petition to fix tax claims filed by the State of New Jersey. In that case, the Supreme Court observed that "[i]f the reorganization court lacked the power to deal with tax liens of a State, the assertion by a State of a lien would pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other state tribunals. That would . . . seriously impair the

other parties in interest a forum in which to enforce their rights under the Code, which of course remains the "supreme Law of the Land." U.S. Const., art. VI, cl. 2. Indeed, the Court has held that the Supremacy Clause not only empowers a state court to exercise jurisdiction over a federal claim, *Claflin v. Houseman,* 93 U.S. 130 (1876), but compels it to do so, *Testa v. Katt,* 330 U.S. 386 (1947). Moreover, *Seminole* does not seem to remove from Congress its prerogative to abrogate the common law sovereign immunity enjoyed by states in their own courts by legislating pursuant to its Article I powers. *See Howlett v. Rose,* 496 U.S. 356, 375-78 (1990). As a result, it is doubtful that a party in bankruptcy proceedings will be denied a hearing before some competent tribunal, though possibly not one with the expertise necessary to ensure the *most* uniform treatment under the Code.

In light of this analysis, the court must conclude that § 106 of the Bankruptcy Code was not enacted pursuant to § 5 of the Fourteenth Amendment. No reason exists, therefore, to alter my earlier holding that § 106 is unconstitutional to the extent that Congress purported to employ it as a means by which to abrogate the several

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power of the court to administer the estate and adversely affect the power of . . . the court to promulgate a reorganization plan." *Id.* at 577.

These remarks illustrate the potentially irreconcilable conflict which may now exist between the Bankruptcy Clause and the Eleventh Amendment. Our national bankruptcy system, in which Congress intends debtors to retain the opportunity to reorganize and to obtain a fresh start, may be in grave danger if the states cannot be bound by orders issued by the federal courts under bankruptcy law. Justice Shiras was truly prophetic when he intimated nearly a century ago: "It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the 11th Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress . . . ." *Prout v. Starr,* 188 U.S. 537, 543 (1903).

states' immunity under the Eleventh Amendment. There does remain, however, the question of whether the Eleventh Amendment can be invoked by the taxing authorities in this case.

III.

In response to the taxing authorities' invocation of immunity under the Eleventh Amendment, the debtors contend that their motion for declaratory judgment does not constitute a "suit." In two distinct arguments, the debtors focus first on the "declaratory" nature of the action and then on the distinctive jurisdiction of this court. Both points, however, lack merit and must be rejected.

The debtors maintain that this action, being one for declaratory judgment, does not fall under the rubric of the Eleventh Amendment. In the order entered April 4, 1996, the court ruled that transfers of real property by or to the debtors from April 6, 1992, through September 30, 1993, were exempt from transfer and recordation taxes pursuant to 11 U.S.C. § 1146(c). In no part of the proceeding leading up to that order, however, did the debtors initiate an action under *Ex parte Young*, 209 U.S. 123 (1908), to have the court enjoin officials of the taxing authorities from holding the funds in violation of the Bankruptcy Code.[26] Moreover, insofar as the transfers of real property at issue had been even before the plan's confirmation, the debtors certainly understood that the order addressed no threat of any future violation. The debtors' only purpose in seeking relief of a "declaratory" nature, then, must have been to obtain an order

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26 Since the Supreme Court's decision in *Ex parte Young*, the federal judiciary has retained jurisdiction "over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" *Seminole*, 116 S. Ct. at 1132.

which could act as res judicata in some later proceeding to actually recover the monies.[27] The Supreme Court has deemed such an order to "have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment." *Green v. Mansour,* 474 U.S. 64, 73 (1985); *see also Manning v. South Carolina Dep't of Highway and Pub. Transp.,* 914 F.2d 44, 48-49 (4th Cir. 1990). I find, therefore, that the declaratory nature of the debtors' action does not preclude it from constituting a "suit" under the Eleventh Amendment.

The debtors argue too that, in entering the April 4, 1996, order, the court acted pursuant to an *in rem* jurisdiction necessary to the very existence of a uniform law of bankruptcy. According to the debtors, this unique *in rem* jurisdiction over the bankruptcy estate endures as an exception to the Eleventh Amendment's general denial of jurisdiction to the federal courts. The Supreme Court, however, has rejected this theory rather explicitly. In *United States v. Nordic Villages, Inc.,* 503 U.S. 30 (1992), an officer of the Chapter 11 debtor withdrew corporate funds and had the Internal Revenue Service apply them to his individual tax liability. The bankruptcy court authorized the trustee to recover the transfer from the Service, and both the district court and the court of appeals affirmed. The Supreme Court reversed, stating that it has "never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and [has] suggested that no such exception exists." *Id.* at 38.

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27 Indeed, the debtors repeatedly insisted in their briefs that the taxing authorities, as creditors, will be bound by the confirmed plan under the principle of res judicata. *See* NVR's Consolidated Opp'n to the Mots. for Recons. at 31-35; NVR's Supplemental Mem. in Opp'n to the Mots. for Recons. at 16.

The Court simply found nothing peculiar to the bankruptcy system which would warrant a suspension of the federal government's immunity in this setting. In these cases, the debtors have presented no point of law to suggest that a different rule should be applied to a state's immunity under the Eleventh Amendment. Therefore, I find that the nature of this court's jurisdiction does not except the debtors' "suit" from the reach of the Eleventh Amendment.

IV.

The debtors next contend that certain taxing authorities cannot be "states" under the Eleventh Amendment.[28] The Court of Appeals for the Fourth Circuit recently established the standard for reviewing such an argument in *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996). In *Harter*, the court had to ascertain whether a county sheriff in North Carolina enjoyed immunity under the Eleventh Amendment. Though reaffirming that constitutional immunity extends only to "state agencies that may be properly characterized as arms of the State," *id.* at 337 (internal quotations omitted), the court acknowledged the difficulties in determining whether a government entity with both state and local characteristics constitutes an "arm of the state."

Previously, the court in *Ram Ditta v. Maryland Nat'l Capital Park and Planning Comm.*, 822 F.2d 456 (4th Cir. 1987), had adopted a "four-part, non-exclusive inquiry" to determine "when an entity is the alter ego of a state for Eleventh Amendment purposes." *See also Ristow v. South Carolina Ports Auth.*, 27 F.3d 84, 85 (4th

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[28] Of course, even the debtors do not dispute that the Commonwealth of Pennsylvania itself possesses immunity under the Eleventh Amendment. Therefore, I will restrict my comments on this subject to the Maryland entities and those Pennsylvania taxing authorities of a more "local" nature.

Cir. 1994), *vacated by* 115 S. Ct. 567 (1994). The first, and "most important consideration," is whether "the state treasury will be responsible for paying any judgment that might be awarded." *Ram Ditta*, 822 F.2d at 457. The three remaining factors include, but have not been limited to, (1) whether the entity exercises a significant degree of autonomy from the state; (2) whether the entity participates in local rather than state concerns; and (3) how state law characterizes and treats the entity. *Id.* at 457-58.

This test endured without alteration until the Supreme Court issued its opinion in *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394 (1994). In *Hess*, the Court addressed the manner in which the Eleventh Amendment should be applied to multistate entities created under the Compact Clause.[29] When factors similar to those articulated in *Ram Ditta* pointed in different directions, the Court concluded that "the Eleventh Amendment's twin reasons for being remain our prime guide." *Id.* at 404. Those reasons had been identified as a concern that federal court judgments not deplete state treasuries and a need to preserve the integrity retained by each state in the federal system. *Id.* at 400. In particular, the Court recognized "the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." *Id.* at 404.

With *Hess* having bolstered *Ram Ditta*'s emphasis on the state treasury factor, the court of appeals confirmed in *Harter* that an entity will be immune from suit if the state will pay the judgment. *Harter*, 101 F.3d at 339. In such an instance, "the other *Ram Ditta* factors need not be con-

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[29] The Compact Clause provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State. . . ." U.S. Const, Art. I, § 10, cl. 3.

sidered. *Id.* The court noted too that the state treasury factor is "generally determinative" even if the state will not pay the judgment. Although courts still must evaluate the remaining *Ram Ditta* factors, they should "keep[] in mind that the most important consideration weighs against immunity." *Id.* at 340.

Applying this analysis to our case,[30] the Pennsylvania townships, boroughs, and school districts may be disposed

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30 It is worth noting that the Court of Appeals for the Fourth Circuit has become divided over the intricacies of this examination. In *Gray v. Laws*, 51 F.3d 426 (4th Cir. 1995), another panel of the court had considered the Eleventh Amendment defense advanced by a country and its health department supervisors. Addressing the impact of *Hess*, the court had observed that "the Court never indicated whether the considerations of the state treasury and state sovereignty are generally dispositive if they both suggest the same conclusion, regardless of the conclusion suggested by the other factors." *Gray*, 51 F.3d at 433. With no "relative weights ascribed to these factors," the court held that "a determination that the state treasury wil be liable for a particular judgment is largely, if not wholly, dispositive of entitlement to Eleventh Amendment immunity in the single state context." *Id.* "If, on the other hand, the state's treasury will not be affected by a judgment in the action, then the availability of immunity . . . must be determined by resort to the other relevant considerations referenced by the Court." *Id.* at 434.

When the decision in *Harter* was handed down, a published order accompanied it. According to that order, a member of the court had requested a poll on whether the appeal should have been reheard *en banc*. After seven of the thirteen judges voted against a rehearing, *Harter*, 101 F.3d at 343, Judge Luttig filed a vigorous dissent joined by Chief Judge Wilkinson and Judges Russell, Wilkins, and Williams. The dissent noted at the outset that, "[o]ut of respect for the rule of law and principles of *stare decisis*, and in order to avoid confusion concerning the law in our circuit, we have adopted for our court a rule that one panel cannot overrule or modify a published opinion of another panel." *Id.* at 343 (Luttig, J., dissenting from the order denying a rehearing *en banc*). Instead, only the "full court sitting *en banc*" may modify established precedent. *Id.* The dissent believed the panel in *Harter* to have acted contrary to this principle and found their decision to be a

of rather easily. Not only have they failed even to hint at evidence that a judgment imposed upon them will draw upon the coffers of the Commonwealth, but these local entities have neglected to submit a brief or a pleading which could justify a finding by this court that the reach of the Eleventh Amendment extends to them. Indeed, the law appears to compel a contrary result. Courts dating back to the nineteenth century have been uniform in their agreement that political subdivisions, such as townships and boroughs, cannot invoke their parent state's constitutional immunity from suit in federal court. *See Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); *see also Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400-01 (1979). Moreover, the Third Circuit recently has held that Pennsylvania school districts, particularly insofar as they have the authority to

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"flagrant disregard of our recent opinion" in *Gray* and "demonstrably at odds with prior case law." *Id.*

Three particular problems with *Harter* were stressed by the dissent: (1) it 'does not accord any particular significance to the state sovereignty factor," *id.* at 344; (2) it holds that "the impact on the state treasury was necessarily dispositive of the inquiry," *id.* at 345; and (3) it "implied that [other] Eleventh Amendment concerns are to be discounted and downgraded when the state treasury is not implicated." *id.* In light of the inconsistency between *Gray* and *Harter* and the court's refusal to rehear *Harter en banc*, the dissent argued that the later decision "cannot hereafter be regarded as controlling authority on questions of Eleventh Amendment immunity with regard to matters where the two opinions conflict." *Id.* at 344.

The division within the court of appeals on this question presents a substantial hurdle, since the dissent correctly points out that one panel cannot overrule another. *See, e.g., Norfolk & W. Ry. v. Director, Office of Workers' Compensation Programs*, 5 F.3d 777, 779 (4th Cir. 1993). I have to rely, however, on the majority's belief that *Harter* does not effectively modify or do away with the reasoning employed in *Gray*. I therefore have elected to follow *Harter*, treating it as only having "refined" the Eleventh Amendment analysis developed earlier.

issue bonds and collect taxes, cannot partake of the Commonwealth's Eleventh Amendment immunity. *Lester H. v. Gilhool*, 916 F.2d 865, 870-71 (3d Cir. 1990). Therefore, this court has sufficient jurisdiction to bind these local taxing authorities of Pennsylvania with the April 4, 1996, order.

The situation in Maryland presents more of a problem. The circuit court clerks and other local officials have become embroiled in this proceeding in three distinct capacities: (1) as collectors [31] of county transfer taxes assessed by and paid to the counties (Md. Code Ann., Tax-Prop. §§ 13-401 to -408); (2) as collectors [32] of recordation taxes assessed under state law but paid to the counties (Md. Code Ann., Tax-Prop. §§ 12-101 to -113); and (3) as collectors [33] of state transfer taxes assessed by and paid to the State (Md. Code Ann., Tax-Prop. §§ 13-201 to -209). The debtors concede that Maryland's Eleventh Amendment immunity will insulate the clerks when acting

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31 Again, the circuit court clerks of Anne Arundel and Howard Counties collect the county transfer tax in their respective counties. The departments of finance of Baltimore and Montgomery County and the treasurer of Harford County, entities which also collect the county transfer tax, "were not originally notified as interested parties to the Motion for Declaratory Judgment, because they had not ruled on NVR's refund claims at the time the Motion was filed, briefed or argued." NVR's Consolidated Opp'n to the Mots. for Recons. at 17 n.12. At some time prior to June 1996, however, those entities had denied the debtors' claim for a refund, and yet, the debtors never moved to join them as defendants to this action. No reason exists, therefore, to consider the question of their status under the Eleventh Amendment.

32 Again, the circuit court clerks for Anne Arundel, Baltimore, Carroll, Harford, Howard, Montgomery, Frederick, and Washington Counties collect the state recordation tax.

33 Again, the circuit court clerks of all nine counties collect the state transfer tax.

in the third role.[34] NVR's Consolidated Opp'n to the Mots. for Recons. at 16-21. The parties dispute, however, whether the clerks can enjoy the same protection when performing the first and second duties.

As indicated earlier, the court first must ascertain the impact of a judgment against the officials, in each of their two relevant capacities, on the Maryland treasury. This inquiry in turn necessitates a look at the taxes at issue. The county transfer tax is imposed by the governing body of a county at its option. Md. Code Ann., Tax-Prop. § 13-402.1(a). The county then appoints a collector each year, Md. Code Ann., Tax-Prop. § 4-101(b), who will receive the taxes and remit them to the appropriate county official. Md. Code Ann., Tax-Prop. § 4-201. The recordation tax, which is much like an excise tax, has been imposed under State law. Md. Code Ann., Tax-Prop. § 12-102. In every county except Prince George's, the State has required that the circuit court clerk collect the tax, Md. Code Ann., Tax-Prop. § 12-109(b)(1), and then remit the funds to the governing body of the county. Md. Code Ann., Tax-Prop. § 12-110(a)(1).

Whether revenue from these taxes should be deemed "local" and "state" came into doubt in 1984, when the Legislative Policy Committee of the Maryland General Assembly commissioned a task force on the clerks of the circuit courts. The issues explored by the task force included the funding basis for, the budgetary oversight of, and the functions performed by the clerks' offices. Clerks of Court Task Force, Report to the General Assembly of 1984, at 1 (1984). The task force noted that, "[p]res-

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[34] Even if the debtors had not yielded on this point, the result is obvious. Since any refund of the state transfer tax would be drawn from the Maryland treasury, *Harter* directs that the circuit court clerks be deemed immune from suit in their capacity as collectors of the tax.

ently, the Constitution provides that the expenses of these offices shall be paid from the fees and commissions of the office" and that, "[w]hen these revenues are insufficient, statute provides that they *may* be supplemented from the state budget." *Id.* Since the clerks' funding system depended heavily on revenue tied to real estate transactions, which in turn were subject to swings in the general economy, the task force observed that "the net effect of clerks' offices on the general funds has been unpredictable." *Id.* at 2.

In light of these findings, the task force recommended that "the State Constitution be amended to provide that clerks' offices shall no longer be funded from the fees of their office. Instead, revenues of the clerks should be revenues of the State and clerks' operations should be provided through the State budget." *Id.* at 7. As a consequence, the Maryland General Assembly in 1986 amended Article IV, Section 10 of the State's constitution to read: "The offices of the Clerks shall be funded through the State budget. All fees, commissions, or *other revenues established by Law for these offices* shall be State revenues, unless provided otherwise by the General Assembly." Md. Const., art. IV, § 10(b) (emphasis added).

With the enactment of this amendment, a question arose as to whether the county transfer and recordation *taxes* could be deemed "other revenues established by Law for these offices" and therefore "State revenues." The court can find no provision in the Maryland Code, however, that directs those counties which receive the county transfer and recordation taxes to use this revenue to fund even in part the circuit court clerks. Maryland law simply maintains that "[t]he administration, expenditure, and accounting of all sum or sums raised, borrowed, or obtained

by any county . . . shall be subject to the control of the county commissioners or the public body in the county that the county commissioners designated . . . ." Md. Ann. Code art. 24, § 9-110(a). The State gives the governing body of a municipal corporation identical authority. Md. Ann. Code art. 24, § 9-110(b).

Even more persuasive in this case, though, is the manner in which Maryland law speaks of any refund of these taxes. Pursuant to statute, refunds shall be paid "[f]rom the money that the county or municipal corporation designates for the refund payment; or, [i]f no money has been designated, from any money *of the county or municipal corporation* in the hand of the tax collector." Md. Ann. Code art. 24, § 9-713(b) (emphasis added). As in every other reference to the revenue from these two taxes, the Maryland Code again treats the funds as belonging to the relevant county or municipal corporation alone, which in turn has the discretion to use the monies for any lawful purpose. Notwithstanding the revised constitutional provision, then, the court must find that the county transfer and recordation taxes constitute "local" revenue and that a refund of those taxes will have no impact on the Maryland treasury.

Having thus found that the Maryland treasury will not be affected by a judgment against the circuit court clerks in their capacity as collectors of the county transfer and recordation taxes, the court must "examine the remaining *Ram Ditta* factors, keeping in mind that the most important consideration weighs against immunity." *Harter*, 101 F.3d at 340. As mentioned earlier, *Ram Ditta* requires the court to evaluate whether the entity exercises a significant degree of autonomy from the state, whether the entity participates in local rather than state concerns, and how state law characterizes and treats the entity. *Ram Ditta*, 822 F.2d at 457-58.

Under the Constitution of Maryland, the circuit court clerk for each county is elected by the residents of that county. Md. Const. art. IV, § 25. The clerk's duties range from keeping custody of books and records to issuing writs from the circuit court. Md. Code Ann. Cts. & Jud. Proc. § 2-201. As stated earlier, the constitution now provides that each clerk will be funded from the State budget. Md. Const. art. IV, § 10(b); Md. Code Ann., Cts. & Jud. Proc. § 2-504.1. While statutory law governs the clerk's salary, Md. Code Ann., Cts. & Jud. Proc. § 2-504, rules governing the appointment, removal, classification, and salaries of the clerk's employees have been set by the Maryland Court of Appeals. Md. Code Ann., Cts. & Jud. Proc. § 2-505.

These provisions indicate that the circuit court clerk, in essence, is a county official regulated primarily by State law, funded from the State treasury, and overseen by the State judiciary. In the context of the *Ram Ditta* factors, then, the court concludes that the clerk of the circuit court does not exercise a great degree of autonomy from the State and that Maryland law goes to great lengths to govern the clerk's operations. Nevertheless, the clerk functionally is a county agent concerned more with the concerns of the local circuit court rather than those of the State. Since these "indicators of immunity point in different directions," *Hess*, 115 S. Ct. at 404, the absence of any impact on the Maryland treasury is dispositive and, according to *Harter*, tips the balance against a finding of constitutional immunity. As a result, the Maryland taxing authorities have no basis to claim immunity under the Eleventh Amendment when collecting the county transfer and recordation taxes.

In light of the foregoing discussion, then, the court finds that only the Maryland circuit court clerks as collectors of the state transfer tax and the Commonwealth

of Pennsylvania still have a basis for invoking the Eleventh Amendment in these cases.

V.

In their last argument, the debtors contend that the taxing authorities have waived their Eleventh Amendment immunity from suit in this court. Before turning to the merits of the debtors' position, some comment first should be made on the Eleventh Amendment as a whole. More than any other provision of the Constitution taken singly, this Amendment reminds us of the precarious state of our union during its early years. Indeed, the Amendment was proposed just two days after the Supreme Court decided a matter in which the State of Georgia refused to even appear. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Since being enacted, it often has been used as the balance with which the prerogatives of the several states have been weighed against the supremacy of the federal government. *See* John E. Taylor, Note, *Express Waiver of Eleventh Amendment Immunity*, 17 Ga. L. Rev. 513, 520-22 (1983). At stake each time has been the manner in which we, as a sovereign people, choose to be governed.

This concern for federalism has tended to guide the judiciary's effort to fashion a proper jurisprudence for the Eleventh Amendment. *See generally* David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv. L. Rev. 61 (1984). The result has been a move away from a strict reading of its text. Since *Hans v. Louisiana*, 134 U.S. 1, 14-15 (1890), the Supreme Court has "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with

their sovereignty intact . . . ." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). With such an unequivocal incorporation of the concept of sovereign immunity into the Eleventh Amendment, the federal courts no longer have been able to hold that the Amendment is wholly jurisdictional in nature, that it acts only to limit the grant of jurisdiction found in Article III of the Constitution. *Hans* shifted the focus from the federal judiciary, and its reach under Article III, to the states and their status as equal sovereigns.

With Eleventh Amendment jurisprudence being developed along this new line, it has become "possible to argue that a state could consent to be sued in federal court despite the Eleventh Amendment; or, in other words, that the state could waive the immunity conferred by the Eleventh Amendment." John V. Orth, *The Judicial Power of the United States* 123 (1987). The Supreme Court has insisted, however, that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights."[35] *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *see also Welch v. Texas Dep't of High-*

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[35] At one time, the Supreme Court had insisted that an implied waiver might arise where a state consciously enlisted in and accepted the benefits of a federally regulated program which required, as a condition of participation, that the state surrender its constitutional immunity. *See Parden v. Terminal Ry. Of the Ala. State Docks Dep't*, 377 U.S. 184 (1964). A decade later, however, the Court significantly narrowed this concept in *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973), and *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). More recently, in *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 478 (1987), the Court expressly overruled "*Parden*'s discussion of congressional intent" and, though not reaching the question of implied waiver, seemed to suggest that the doctrine is no longer viable. In any event, since the cases before this court do not involve a federal program similar to that in *Parden*, the issue need not be addressed in any depth here.

ways and Pub. Transp., 483 U.S. 468, 473 (1987). Therefore, effect will be given to a state's waiver of its Eleventh Amendment immunity "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Edelman*, 415 U.S. at 673 (internal quotation omitted); *see also Port-Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-06 (1990); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985). The consent, in other words, must be "unequivocally expressed," *Pennhurst v. State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 99 (1984), and will be strictly construed, *Lelsz v. Kavanagh*, 807 F.2d 1243, 1253 (5th Cir. 1987), *cert. dismissed*, 483 U.S. 1057 (1987). For instance, a state will not waive its constitutional immunity from suit in federal courts merely by consenting to suit in its own courts. *Feeney*, 495 U.S. at 306.

At least one commentator has noted that, "[s]ince state governments seldom deal explicitly with the eleventh amendment," express waiver usually will be the product of a federal court's construction of state constitutions, state legislation, state conduct as a federal litigant, or state court decisions. Taylor, *supra*, at 526-27. After a thorough review of the constitutional, statutory, and common law of both Maryland and Pennsylvania, I can find no provision which would indicate that the immunity secured by the Eleventh Amendment has been waived by the taxing authorities in this case. Maryland law simply does not speak to such a waiver in the context of either a tax or a bankruptcy,[36] and no Maryland court has

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[36] While the Maryland constitution does not mention the Eleventh Amendment, the State code addresses it in five instances. Md. Code Ann., Educ. § 12-104(g)(5) and Md. Code Ann., Educ. § 14-

found cause to press the subject very far on its own.[37] The Pennsylvania legislature has stated its intent more openly by enacting, in response to a supreme court decision which abrogated the Commonwealth's sovereign immunity,[38] a statute which specifically retains every vestige of Pennsylvania's immunity under the Eleventh Amendment. 42 Pa. Cons. Stat. Ann. § 8521(b).

204(g)(5) prevent subsections governing Maryland universities and colleges from being construed as waiving or abrogating those universities' and colleges' immunity under the Eleventh Amendment. Md. Code Ann., Nat. Res. § 3-501(s) precludes a private party from initiating a suit under the Interstate Environmental Compact which would infringe upon the State's Eleventh Amendment immunity. Md. Code Ann., State Gov't § 12-103(2) protects any defense to the State Tort Claims Act which arises under the Eleventh Amendment. Md. Ann. Code art. 88A, § 13A(g)(3) refuses to waive the State's Eleventh Amendment immunity in a suit arising out Maryland's human resources program for Montgomery County.

[37] The Maryland judiciary does recognize that, if the State files suit in federal court as a plaintiff, it waives any immunity under the Eleventh Amendment "with respect to a counterclaim arising out of the same event which is the subject of the state's claim." *Maryland v. Hogg*, 535 A.2d 923, 930 (Md. 1988); *see also* note 41, *infra* (discussing further the concept of waiver in Maryland). Such a waiver, however, is "limited to a counterclaim asserted defensively in recoupment, for the purpose of defeating or diminishing a state's recovery, but not to a counterclaim asserted for the purpose of obtaining an affirmative judgment." *Id.* Although this principle has no relevance here, I mention it in light of suggestions that § 106(b) and (c) may be "constitutionally applied to some counterclaims and setoffs asserted against state entities that file proofs of claim in bankruptcy cases." *See* S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 Am. Bankr. L.J. 195, 210 (1996).

[38] *Mayle v. Department of Highways*, 388 A.2d 709, 719 (Pa. 1978). For an excellent discussion of the sovereign immunity question in Pennsylvania, *see* James J. Dodd and Martin A. Toth, *The Emperor's New Clothes: A Survey of Significant Court Decisions Interpreting Pennsylvania's Sovereign Immunity Act and Its Waivers*, 32 Duq. L. Rev. 1 (1993).

This leaves only the taxing authorities' conduct in the present bankruptcy cases as a possible declaration of express consent.[39] As this opinion is prepared, eight courts in the post-*Seminole* era have concluded that a state waives its Eleventh Amendment immunity when filing a proof of claim in the debtor's case. Three of these courts simply made blanket statements with little, if any, comment or authority. *See Sacred Heart Hosp. of Norristown v. Pennsylvania Dep't of Welfare (In re Sacred Heart Hosp. of Norristown)*, 199 B.R. 129, 135 (Bankr. E.D. Pa. 1996), *rev'd*, 204 B.R. 132 (E.D. Pa. 1997); *In re Lush Lawns, Inc.*, 203 B.R. 418, 421 (Bankr. N.D. Ohio 1996); *Sparkman v. State of Fla. Dep't of Revenue (In re York-Hannover Devs., Inc.)*, 201 B.R. 137, 142 (Bankr. E.D.N.C. 1996). Three others, though discussing the issue in slightly more depth, nevertheless relied on § 106(b) as directing that a waiver be found when a state files a proof of claim. *See California Employment Dev. Dep't. v. Taxel (In re Del Mission, Ltd.)*, 98 F.3d 1147, 1152 n.6 (9th Cir. 1996); *In re Martinez*, 196 B.R. 225, 229-30 (D.P.R. 1996); *California Target Enters., Inc. v. California State Water Resources Control Bd. (In re Lazar)*, 200 B.R. 358, 379 (Bankr. C.D. Cal. 1996). Since I already have found § 106(b) unconstitutional to the extent that it purports to revise Eleventh Amendment jurisprudence, this rationale must be rejected.

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39 Both the Maryland circuit court clerks (*see* Mem. in Supp. of Dismissal, Abstention, or Summ. J. and in Opp'n to Debtors' Mot. for Declaratory Relief at 13-15) and the Commonwealth of Pennsylvania (*see* Motion for Reconsideration at 2) asserted their Eleventh Amendment immunity early in these proceedings. It therefore is not necessary to consider whether a "general appearance" by such governmental units constitutes a waiver of their Eleventh Amendment immunity. *See Barfield v. Backwood (In re Secretary of the Dep't of Crime Control and Pub. Safety)*, 7 F.3d 1104, 1148 n. 6 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 2106 (1994).

The two remaining cases, however, deserve more consideration. *In Headrick v. Georgia (In re Headrick)*, 200 B.R. 963 (Bankr. S.D. Ga. 1996), Chapter 13 debtors filed an adversary complaint alleging that Georgia had violated the automatic stay by continuing to mail demand letters and collection notices after the petition had been filed. In *Burke v. Georgia (In re Burke)*, 200 B.R. 282 (Bankr. S.D. Ga. 1996), discharged Chapter 7 debtors reopened their case to institute an action against Georgia for violating the discharge injunction. The same bankruptcy judge heard both matters and then issued opinions which contain almost identical language.

The court noted at the outset that Georgia, in both its constitution and its code, has refused to expressly waive its Eleventh Amendment immunity. *In re Headrick*, 200 B.R. at 967-68; *In re Burke*, 200 B.R. at 286-87. This finding, however, did not end the inquiry. The court observed that, although the Supreme Court had "not directly addressed whether a State waives its Eleventh Amendment immunity from suit in federal court by filing a proof of claim in a bankruputcy case," the Court had "ruled that creditors who file proofs of claim against a debtor's estate submit themselves to the bankruptcy court's equitable jurisdiction." *In re Headrick*, 200 B.R. at 968; *In re Burke*, 200 B.R. at 287. Since Georgia had submitted a proof of claim and triggered "the process of allowance and disallowance of its claim," the State had subjected itself "to this court's equitable power" and thereby had waived its Eleventh Amendment immunity. *In re Headrick*, 200 B.R. at 968; *In re Burke*, 200 B.R. at 287. "If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power, otherwise, orderly and expeditious proceedings would be impossible and a fundamental pur-

pose of the Bankruptcy Act would be frustrated." *In re Headrick,* 200 B.R. at 969; *In re Burke,* 200 B.R. at 287.

Although there is some merit to the bankruptcy court's reasoning, I would not extend it so far. The Supreme Court decisions cited in *Headrick* and *Burke* involved "a creditor's right to jury trial under the Seventh Amendment to the United States Constitution." *In re Headrick,* 200 B.R. at 968; *In re Burke,* 200 B.R. at 287; *see Langenkamp v. Culp,* 498 U.S. 42 (1990); *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33 (1989). The bankruptcy court believed that the rationale[40] used in those Seventh Amendment cases "applies equally here." *In re Headrick,* 200 B.R. at 968; *In re Burke,* 200 at 287. To the contrary, those rulings focused only on *which* jurisdiction of the bankruptcy court a private party consents to when filing a proof of claim. At most, they can be read only as reaffirming the principle that personal jurisdiction is a legal right protecting the individual which may be waived. *See O'Brien v. R.J. O'Brien & Assocs., Inc.,* 998 F.2d 1394, 1399 (7th Cir. 1993).

Whether a state waives its Eleventh Amendment immunity in bankruptcy has implications far beyond those contemplated in *Langenkamp* and *Granfinanciera.* Recognizing this fact, the Supreme Court has given great deference to the right of states to refuse the jurisdiction of the federal judiciary. Not only must any waiver be

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[40] The Court in *Granfinanciera* held that, even though the bankruptcy court generally conducts proceedings in equity, parties who had not filed a proof of claim in the case retained their Seventh Amendment right to a jury trial on "legal" causes of action. In *Langenkamp,* the Court ruled that creditors who do file a proof of claim have no Seventh Amendment right to a jury trial since they have submitted themselves to a "restructuring of the debtor-creditor relationship through the bankruptcy court's *equitable jurisdiction.*" *Langenkamp,* 498 U.S. at 44.

expressed unambiguously, *Pennhurst II*, 465 U.S. at 99, but the Court has held that a state may raise a defense predicated on the Eleventh Amendment at any time, even on appeal, *Edelman*, 415 U.S. at 677-78. I therefore am unwilling to conclude that the state's filing of a proof of claim constitutes a wholesale submission to the jurisdiction of the bankruptcy court as to any matter arising in or related to the debtor's case. Instead, the filing of a claim should at most be interpreted only as an express consent to the adjudication of that claim. *See Gardner v. New Jersey*, 329 U.S. 565, 574 (1947). This holding comports more with the tendency of modern Eleventh Amendment jurisprudence to disfavor finding that a broad waiver has been effected.

Turning to our case, then, not all the taxing authorities filed proofs of claim. Prince George's County submitted (1) a claim in the NVHomes Limited Partnership case on May 14, 1992, for various real property taxes due for the 1992 fiscal year; (2) a claim in the Ryan Operations General Partnership case on September 9, 1992, for various real property taxes due for the 1991, 1992, and 1993 fiscal years; and (3) a second claim in the NVHomes Limited Partnership case on September 9, 1992, for various real property taxes due for the 1992 and 1993 fiscal years. On July 28, 1992, Howard County submitted a claim in the jointly administered case for water and sewer services and for various real property taxes due for the period beginning July 1, 1992, and ending June 30, 1993. The Commonwealth of Pennsylvania submitted (1) a claim for in the Ryan Operations General Partnership case on June 29, 1992, for sales, use, and hotel occupancy taxes; (2) a claim in the NV Holding case on June 18, 1992, for a capital stock franchise tax; and (3) a claim in the Ryan Financial Services case on

March 4, 1993, for an employer withholding tax and a corporate net income tax.

Since Pennsylvania did not file a proof of claim in the debtors' cases for any real property transfer or recordation taxes, the Commonwealth cannot be bound by this court's order of April 4, 1996, under the theory of express waiver. The same might not be said, however, for the Maryland taxing authorities. With both Prince George's County and Howard County having included in their proofs of claim those state transfer taxes due during the period beginning April 6, 1992, and ending September 30, 1993, they at least facially appear to have waived their Eleventh Amendment immunity as to any adjudication of those claims. The only question left is whether those counties possessed the authority to effect such a waiver.

In *Jenkins v. Massinga*, 592 F. Supp. 480 (D. Md. 1984), a class action suit was filed to recover a 5% surcharge imposed by the State of Maryland and Prince George's County on child support payments. The plaintiffs asserted that the State had waived its Eleventh Amendment immunity defense when its alleged agent, Prince George's County, had returned those fees still in the county purse. The court observed, however, that the plaintiffs had pointed to no statute by which the State had consented to such suits. Citing opinions issued by the Fourth Circuit Court of Appeals [41] and the Maryland Court of Appeals,[42] the court ruled that, "in the absence

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41 The decision in *Linkenhoker v. Weinberger*, 529 F.2d 51 (4th Cir. 1975), relied heavily on a Maryland law which forbade the judiciary from construing an appearance by the Attorney General as a waiver of the common law sovereign immunity enjoyed by any arm of the State. That provision remains on the statute books, recodified at Md. Code Ann., State Gov't § 12-306(b).

42 *Charles E. Brohawn & Bros., Inc. v. Board of Trustees of Chesapeake College*, 304 A.2d 819 (Md. 1973).

of statutory authorization, neither counsel for the State nor any of its agencies may, 'either by affirmative action or by failure to plead the defense,' waive the defense of governmental immunity." *Id.* at 493.

Here, the proofs of claim for Prince George's County were filed by "Robert H. Rosenbaum, Attorney for Prince George's County, Maryland," and the proof of claim for Howard County was filed by "Raymond F. Servary, Jr., Director of Finance." The debtors have highlighted no law operative in Maryland, however, which would authorize either these persons, in their individual or representative capacities, or the counties proper to waive the immunity from suit guaranteed by the Eleventh Amendment. *See Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975) (indicating that courts must find authority for such a waiver in state law). Moreover, the debtors have proffered no basis for finding that these individuals or counties have been empowered to waive any constitutional immunity enjoyed by the circuit court clerks for those counties.[43] I

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[43] No court in a bankruptcy case has decided whether one agency's waiver of its immunity under the Eleventh Amendment will effect a waiver of the constitutional immunity enjoyed by all the agencies of that state. Instead, the opinions have focused on whether all the agencies of a state constitute one "governmental unit" under §§ 106(b) and (c). *See William Ross, Inc. v. Biehn Constr., Inc. (In re William Ross, Inc.)*, 199 B.R. 551, 554-56 (Bankr. W.D. Pa. 1996)

Outside the context of a bankruptcy, at least one district court has held that "the fact that two state agencies in this case have waived their immunity with regard to the claims against them does not require [another] agency to consent to suit for the claims against it. Each state agency is a separate defendant in this action, and each may choose whether to remove the cloak of Eleventh Amendment immunity." *National R.R. Passenger Corp. v. Rountree Transp. & Rigging, Inc.*, 896 F. Supp. 1204, 1207 (M.D. Fla. 1995); *but see New Jersey Dep't of Envtl. Protection v. Gloucester Envtl. Management Servs., Inc.*, 923 F. Supp. 651, 664 (D.N.J. 1996) (noting that "[t]he State colleges and hospitals cannot in

therefore hold that the filing of these proofs of claim does not preclude the circuit court clerks for Prince George's County and Howard County from invoking the Eleventh Amendment in this case.

VI.

In light of this opinion, then, the court will amend the April 4, 1996, order so that it does not bind either the Commonwealth of Pennsylvania or the Maryland circuit court clerks as collectors of the state transfer tax. A separate order will be entered.

Signed this 7th day of March, 1997.

/s/ Douglas O. Tice, Jr.
DOUGLAS O. TICE, JR.
United States Bankruptcy Court

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one breath claim to be the alter egos of the State and as such entitled to share in all of the State's immunities, and in the next breath argue, in effect, that they are not the same State which filed the suit in the first place, albeit through a different State agency").

APPENDIX E

[Filed Mar. 25, 1996]

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 92-11704-T
(Jointly Administered)

Chapter 11 Plan Confirmed

IN RE NVR L.P., *et al.*,
Debtors

ORDER GRANTING DEBTORS' MOTION FOR DECLARATORY JUDGMENT AND DENYING TAXING AUTHORITIES' MOTIONS TO ABSTAIN, DISMISS OR FOR SUMMARY JUDGMENT [1]

THIS MATTER came upon the Motion of NVR Homes, Inc. ("NVR"), successor in interest to Debtors, NVHomes, L.P. and Ryan Operations, G.P., seeking a declaration that the transfers of real property made by these Debtors during the period from April 6, 1992 (the Filing Date) through September 30, 1993, the effective date (the Confirmation Date) under the Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the "Confirmed Plan") were exempt from transfer and recordation taxes ("taxes") pursuant to 11 U.S.C. § 1146(c) ("Debtors' Motion");

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[1] In making its ruling, the court adopts the Proposed Findings of Fact and Conclusion of Law submitted by NVR L.P., on January 5, 1996.

NVR'S MOTION HAVING BEEN OPPOSED by the interested parties, the State of Maryland (on behalf of the Maryland Circuit Court Clerks), the Commonwealth of Pennsylvania, and certain local jurisdictions in Pennsylvania (Hampton Township School District, Borough of Franklin Park, Shaler Township, Shaler Area School District, Seneca Valley School District, Moon Area School District, North Allegheny School District, and Hopewell Township), all of the above being referred to as the "Taxing Authorities"; and

THE TAXING AUTHORITIES HAVING MOVED the Court to abstain from ruling on NVR's Motion, or in the alternative to dismiss NVR's Motion, or in the alternative to grant them summary judgment; and

THE COURT HAVING CONSIDERED the written submissions and the oral presentations by NVR and by the Taxing Authorities; and

IT APPEARING TO THE COURT that NVR applied for refunds of transfer and recordation taxes previously paid and that the States of Virginia, New York, Delaware and North Carolina and local jurisdictions therein have made refunds of the taxes with interest, and that the Taxing Authorities of Maryland and Pennsylvania have refused or failed to refund the taxes, asserting that 11 U.S.C. § 1146(c) is not applicable, and accordingly that there is an actual, justiciable controversy before this Court; and

IT FURTHER APPEARING TO THE COURT that the pre-confirmation transfers at issue here, that is, the purchase of lots and the sale of lots and finished homes, were essential to the formulation, confirmation and consummation of the Confirmed Plan and to Debtors' effective reorganization and emergence from bankruptcy, and

thus fall within the tax exemption of 11 U.S.C. § 1146(c) as interpreted by the authorities, it is therefore

ADJUDGED, ORDERED AND DECLARED, this — day of —, 1996, that the transfers of real property by or to the Debtors, whether by purchase or sale, during the period from April 6, 1992 through September 30, 1993 (as identified and set forth on Exhibits 4, 6 and 7 to the Memorandum in Support of NVR's Motion, which Exhibits are annexed hereto and are a part of this Order, in accordence with Local Rule 112(D) of this Court), were exempt from transfer and recordation taxes pursuant to 11 U.S.C. § 1146(c), and it is further

ORDERED that all Motions of the Taxing Authorities are HEREBY DENIED;

WE ASK FOR THIS:

Notice of Judgment or Order Entered On Docket 3/26/96

/s/ Donald O. Tice, Jr.
DONALD O. TICE, JR.
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 92-11704-T
(Jointly Administered)

Chapter 11
Plan Confirmed

IN RE NVR L.P., *et al.*,
Debtors

NVR'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * * *

H. The Transfers For Which NVR Sought Refunds Are Exempt From State Transfer Or Recordation Taxes Pursuant To 11 U.S.C § 1146(c)

Section 1146(c) provides in pertinent part:

> . . . the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

11 U.S.C.A. § 1146(c) (1993). The transfers at issue are purchases of lots by NVR and sales by NVR to homebuyers during the period from NVR's filing of its petition for reorganization under Chapter 11 on April 6, 1992, continuing through the July 22, 1993 Confirmation Order, and ending on the September 30, 1993 effective date of confirmation.

1. NVR's Transfers Meet The Requirements Of Section 1146(c)

All three of the requirements of Section 1146(c) are readily met by the transfers here at issue.

(a) The Transfers Involved Were "Instruments of Transfer"

None of the parties disputes that NVR's transfers of real property involved "instruments of transfer." The parties' understanding is supported by cases such as *In Re Eastmet Corp.*, 907 F.2d 1487, 1489 (4th Cir. 1990) (". . . no doubt that the deed of trust transaction involved the making or delivery of an instrument of transfer").

(b) The Taxes Paid By NVR Were Stamp Taxes Or Similar Taxes

The parties also do not dispute that the transfer and recordation taxes paid by NVR were "stamp tax[es] or similar tax[es]." Real estate transfer and recordation taxes have frequently been held to be "similar" to stamp taxes. *See, e.g., In Re 995 Fifth Ave. Assoc, Ltd. Partnership*, 963 F.2d 503, 510-12 (2d Cir.), *cert. denied*, 113 S.Ct. 395 (1992) (real estate and other documentary transfer taxes were "similar" to stamp taxes, citing as examples the real estate transfer taxes of several states including New York, Connecticut and Vermont). *995 Fifth Ave.* is conclusive as to this issue.

(c) The Transfers Were Made "Under a Plan Confirmed" Within the Meaning of 11 U.S.C. § 1146(c)

To determine whether NVR's transfers were made "under a plan confirmed" it is necessary to examine how other courts have interpreted that phrase. Legislative history and case law interpreting the § 1146(c) exemption

have made explicit that its purpose is to "facilitate reorganizations by granting tax relief," *see, e.g., In re Jacoby Bender,* 758 F.2d 840, 841 (2d Cir. 1985); *In re Lopez Dev.,* 154 Bankr. 607, 609 (Bankr. S.D.Fla. 1993). The legislative histories of Section 1146(c) and its predecessor sections reveal a pattern of *expansion* of the exemption to serve the underlying purpose of Chapter 11: aiding debtors to reorganize, rather than liquidate, their businesses. *See In re Bonner Mall Partnership,* 2 F.3d 899, 915 (9th Cir. 1993).

Congress initially enacted a stamp tax exemption for corporate reorganizations as part of the 1934 Bankruptcy Act, which included the first corporate reorganization chapter. Prior to the 1934 Act, a similar provision appeared in the chapter on reorganization of railroads. In a 1933 report, the House Judiciary Committee reported on a proposed exemption for securities transfers under railroad reorganizations:

> "[W]hile the committee has no jurisdiction over revenue matters, it felt that the reorganization of the railroads was of such a national necessity at this time that it could consider the suggestion of exempting such issues and transfers of stock from the stamp tax of the revenue act. As the new issues will be mostly in lieu of retired certificates and the transfers of existing outstanding certificates simply a matter of exchange to carry out the scope of reorganization, exemption of such taxation would be of great benefit to the reorganization and of not substantial loss to the Treasury.

H.R. Rep No. 1897, 72d Cong. 2d Sess., at 8 (1933).

Thus, from the beginning, transfer tax exemptions were intended to benefit reorganizations, and to avoid the alter-

native of liquidation. The concern with avoiding liquidation is exemplified by President Hoover's 1933 message to Congress, in which he urged Congress to pass legislation for the reorganization of corporations to avoid the "utterly destructive . . . process of forced liquidation through foreclosure and bankruptcy sale of the assets of . . . corporate debtors," as well as the "obstruction of minority creditors who oppose" workouts, and "long and wasteful receiverships" which "consume the estate." *Message from the President of the United States Transmitting a Recommendation That Legislation Revising the Bankruptcy Laws Be Passed at This Session of Congress,* H.R. Doc. No. 522, 72d Cong. 2d Sess., at 1-2 (1933).

The first transfer tax exemption provision, in the Bankruptcy Act of 1934 (which became 11 U.S.C. § 77B(f)), provided:

> The provisions of subdivisions 1, 2 and 3 of Section A of title VIII of the Revenue Act of 1926, as amended by sections 721, 722 and 723 of the Reveue Act of 1932 and the provisions of sections 724 and 725 of the Revenue Act of 1932 shall not apply to the issuance, transfers, or exchanges of securities or making or delivery of conveyances to make effective any plan of reorganization confirmed under the provisions of this section.

P.L. 296, 73d Cong. 2d Sess., at 919, *reprinted in* Attorney General's Committee on Bankruptcy Administration, "Legislative History of the Act of June 7, 1934, Sections 77A and 77B," *Corporate Reorganization (1934-1941): Documentary History of Section 77B and Chapter X of the Bankruptcy Act,* Vol. 22 at 3 (1941). The Committee Report discussing bill H.R. 5884, which became Section 77B, said of the stamp tax exemption: "subdivision (f) also exempts any issues, transfers or exchange

of securities and *conveyances necessary to carry out the reorganization* from the provisions of the Revenue Act of 1932." H.R. Rep. No. 194, 73d Cong. 1st Sess., at 7 (1933) (emphasis added).

While the 1934 Act only exempted transfers from certain named federal tax provisions, the 1938 Act, which became Section 267 of Title 11 (the immediate predecessor of § 1146(c)), extended the exemption to "*any stamp taxes* now or hereafter imposed under the laws of the United States *or of any state*." H.R. 8046, *reprinted in* H.R. Rep. No. 1409, 75th Cong. 2d Sess., at 111 (1937) (emphasis added). Section 267 also introduced the "under [a] plan confirmed" language. Section 267, 11 U.S.C. § 667, recited:

> The issuance, transfer or exchange of securities, or the making or delivery of instruments of transfer under any plan confirmed under this chapter, shall be exempt from any stamp taxes now or hereafter imposed under the laws of the United States or of any State.

It is particularly noteworthy that the definitional section of old Chapter X at that time defined "plan" as a "plan . . . *proposed* in a [corporate reorganization] proceeding . . ." H.R. 8046 at 98 (emphasis added). Inserting this definition in place of the word "plan" in the 1938 version of the tax exemption leads to the conclusion that the transfer only had to be made under a *proposed* plan, that was ultimately confirmed. Consistent with this interpretation, in discussing this expanded transfer tax exemption, the House Judiciary Committee said:

> It is felt that *any leniency of this kind* on the part of the Government, when its interests are properly safeguarded, will contribute to the success of the

> plan of reorganization and to the *general objective of preserving a business enterprise* so that it may not only continue to be economically productive but also productive of future normal taxes.

H.R. 8046 at 56 (emphasis added).

The Bankruptcy Reform Act of 1978, enacted after eight years of study and testimony, produced the most recent, and most expansive, version of the transfer tax exemption: Section 1146(c). The Senate Judiciary Committee confirmed that Section 1146(c) was "derived from Section 267 of the present Bankruptcy Act." S. Rep. No. 989, 95th Cong. 2d Sess., at 132, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5918. The 1978 House Report elaborated on the purposes to be served by Chapter 11 business reorganizations:

> . . . To restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. . . . It is more economically efficient to reorganize than liquidate, because it preserves jobs and assets.

H. Rep. 595, 95th Cong. 2d Sess., at 220, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6179. In discussing Section 1146(c), the House Report recognized that, while 1146(c) was

> modeled after Section 267 of the Bankruptcy Act . . . Section 1146(c) of title 11 *broadens the exemption* to any stamp tax or similar tax on a security or a transfer instrument *dealt with under the consolidated Chapter 11*. No opposition has been voiced with respect to this section.

Id. at 281, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6238 (emphasis added).

Thus, the history of this tax exemption for corporate reorganizations shows a pattern of expanding the exemption, motivated by an ever-present concern with encouraging business reorganization and avoiding liquidation. The transfers to be exempted have been broadened from certain transfers "to make effective" a plan (1934 Act), to all those "necessary to carry out the reorganization," (Report on 1934 Act), to the present, exempting those transfers merely "*dealt with* under . . . Chapter 11" (Report on Section 1146(c), 1978 Act) (emphasis added).

Courts applying § 1146(c) have focused on the relationship between the transfers and the bankruptcy plan which was confirmed, holding that the transfers are exempt if they are "dealt with" under the plan, (*In re Jacoby-Bender*, 758 F.2d 840, 841-42 (2d Cir. 1985) (*quoting* legislative history of § 1146(c)), "necessary" (*Jacoby-Bender*, 758 F.2d at 842)[8] or "reasonably necessary to consummate the debtor's plan," (*In re Baldwin League of Independent Schools*, 110 Bankr. 125, 127 (S.D.N.Y. 1990)), "essential to the confirmation" of the plan (*In re Smoss*, 54 Bankr. 950, 951-52 (E.D.N.Y. 1985)), or "a precondition to the confirmation and implementation of the plan" (*Smoss*, 54 Bankr. at 951). One court has stated the test as whether the transfer was one "over which the bankruptcy courts have jurisdiction."

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[8] NVR does not, as the Taxing Authorities claim, have to prove that the *tax savings* realized by applying the exemption were "necessary" to its Plan. Such a requirement appears nowhere in the statute, the legislative history or the case law. To the contrary, at least one bankruptcy court has allowed the § 1146(c) exemption knowing that only a nondebtor would benefit from the tax savings. *In re Lopez Dev., Inc.*, 154 Bankr. 607, 609 (Bankr. S.D.Fla. 1993).

In re Amsterdam Ave. Assocs., 103 Bankr. 454, 460 (Bankr. S.D.N.Y. 1989).

Courts interpreting Section 1146(c) often have refused to restrict the application of the tax exemption, even when urged to do so by state and local taxing authorities. Thus, the Second Circuit rejected arguments by the City of New York that a transfer was not "under a plan" because the plan did not refer to the instrument of transfer or give the debtor authority to make the sale at issue. *In Re Jacoby-Bender, Inc.*, 758 F.2d 840, 841 (2d. Cir. 1985). The court rested its analysis on "Congress' apparent purpose in enacting section 1146 . . . to facilitate reorganizations through giving tax relief," as well as the legislative history of Section 1146. *Id.* at 841. The court reasoned that transfers "necessary to the consummation of a plan," were "implicitly . . . 'dealt with' " under the Chapter 11. *Id.* at 841-42.

In *In Re Baldwin League of Independent Schools*, 110 Bankr. 125, 127 (S.D.N.Y. 1990), the City of New York was again rebuffed when it urged a narrow construction of § 1146(c). The debtor took out a mortgage on its property prior to the confirmation of its reorganization plan, which mortgage provided funds for the plan. *Id.* at 126. The district court rejected the City's argument that the transfer was not "under a plan," using the standard first enunciated in *Jacoby-Bender*: "If the transfer was *reasonably necessary* to consummate the Debtor's plan for reorganization, it is within the meaning of § 1146(c)." *Id.* at 127 (emphasis added). Finally, the court rejected the City's policy argument that taxation statutes should be construed in favor of the taxing power, stating that it would not interfere with Congress' policy of "aid[ing] the implementation of plans and the reorganization process by providing transfers of property free of certain taxes." *Id.* at 127.

As in *Lopez* and *Baldwin, supra*, courts have consistently held that transfers made prior to plan confirmation are exempt under § 1146(c). The *Lopez* court, granting a refund, found "no consequence" under the statute between transfers made before and after confirmation:

> the fact that the transfer of the Properties occurred prior to confirmation is, for purposes of 11 U.S.C. § 1146(c), of *no consequence*. As discussed below, the purpose of this section is to *facilitate reorganizations by granting tax relief. The court will not construe this section to limit its applicability to transfers occurring after a plan is confirmed.* To do so would not facilitate reorganizations.

154 Bankr. at 609, n.3 (emphasis added).

The sale in *In Re Smoss Enterprises Corp.*, 54 Bankr. 950 (E.D.N.Y. 1985), likewise was made well before the debtor's plan was confirmed; and the debtor was liquidating under Chapter 11 rather than reorganizing. *Id.* at 951. Nevertheless, the bankruptcy court ruled that the sale was exempt from state and city real estate taxes and the district court upheld its ruling in the face of opposition by the City of New York. The district court rejected arguments by the City that, since the transfer was made pursuant to a *pre-petition contract* and took place *prior* to confirmation, it was not "under a plan," and that since the plan was for liquidation rather than reorganization, the plan was not confirmed under § 1129 as required by § 1146(c). *Id.* at 951-52. The court found the transfer "essential to the confirmation of the plan," and emphasized that (as in NVR's case, where this Court authorized NVR to continue purchases and sales during the Chapter 11 period), the bankruptcy court had "contemplated" the transfer prior to confirmation when it approved the sale. The court also found compelling the

importance of the transfer to the plan—the sale provided the funds for the liquidation plan. *Id.* at 951.

Another example of the interpretation of § 1146(c) is *In Re Permar Provisions, Inc.*, 79 Bankr. 530 (Bankr. E.D.N.Y. 1987), in which the bankruptcy court held exempt a transfer made approximately one year *before* confirmation. Indeed, the debtor in *Permar* had ceased operations, and thus (in direct distinction to NVR) was not even a going concern, although it was still seeking to reorganize its business. 79 Bankr. at 531. Its unsecured creditors were dissatisfied with the progress of the debtor's reorganization efforts and sought to convert the Chapter 11 to a Chapter 7. The debtor advised its creditors at a meeting that it would sell its facility and use the proceeds to fund a reorganization plan, which plan would be filed later. While the proceeds of the sale were crucial to the liquidation plan that was ultimately confirmed, the sale was *not* mentioned in the plan. *Id.* at 532-33.

The *Permar* court held that the same standard should apply whether a sale was made before or after confirmation: whether the transfer was "*essential to the confirmation of the plan.*" *Id.* at 534 (emphasis added). Applying the "essential to the confirmation" standard to the facts, the *Permar* court focused on how proceeds from the preconfirmation sale enabled the trustee to settle with the largest secured creditor who might otherwise have prevented confirmation of the plan. *Id.* at 534. The parallel to NVR is apparent; it was the proceeds of the preconfirmation sales by NVR which were essential to NVR's remaining in business, thus allowing it to develop a sufficient *pro forma* which enabled Bear Stearns to market successfully the $160 million public offering. And it was the proceeds of that public offering that enabled NVR to

pay *its* "largest secured creditor[s]" *i.e.*, the pre-petition Bank Group—who otherwise would have "prevented confirmation of the Plan."

Consistent with the legislative history and judicial interpretations of § 1146(c), the Plan confirmed by this court provided, *inter alia*:

> 4.13. *Exemption from Certain Transfer Taxes.* Pursuant to section 1146(c) of the Bankruptcy Code, the issuance, transfer, or exchange of securities pursuant to the Plan, and the transfer of, or creation of any lien on, any property of any Debtor under, in furtherance of, or in connection with the Plan shall not be subject to any stamp tax, real estate transfer tax, recordation tax, or similar tax.

Similarly, paragraph 16 of the July 22, 1993 Confirmation Order provided as follows:

> In accordance with Section 4.13 of the Plan and pursuant to Section 1146(c) of the Bankruptcy Code . . . the transfer of any property under, *in furtherance of, or in connection with the Plan*, shall not be the subject of any sales, use, stamp, transfer, recordation, or similar tax.

(Emphasis added.)

The purchases and sales by NVR here at issue were certainly "dealt with" under the Chapter 11, as they occurred during its pendency and were approved by the Court in its April 6 and May 4 Orders. Furthermore, they were necessary, indeed essential, to enable NVR to continue in business, to avoid liquidation, to emerge from Chapter 11, and to pay its creditors.

As described in Finding of Fact 56, NVR used the revenues resulting from the transfers to make over fifty

million dollars of payments in pre-petiton debt, including but not limited to payments on the principal owed to the Bank Group, and large payments of trade debt and employee and warranty claims. The transfers also enabled NVR to accumulate a pool of cash needed to pay claims under the Plan. Paragraph 8.02(b) of the Confirmed Plan made the accumulation of sufficient cash to pay the claims which were to receive cash a precondition of the Effective Date of the Plan: ". . . The Debtors shall have sufficient cash to pay the Allowed Class 2 Claims and Allowed Claims in other Classes that are to be paid in cash on the Effective Date. . . ."

The *sine qua non* of the Confirmed Plan was a $160 million public offering of ten-year Notes, underwritten by Bear, Stearns & Co., and sold in September, 1993 pursuant to the Confirmed Plan. The Confirmed Plan required that nearly all of the proceeds of that offering be devoted to paying the claims of the Bank Group. NVR's ability to succeed in that public offering was predicated upon its ability to remain in business in the ordinary course during the Chapter 11 period, resulting in an increasingly positive balance sheet and a *pro forma* projecting future marketing success. Absent the transfers of property which are at issue, there could have been no successful public offering, and no successful Confirmed Plan. Thus, it is clear that the transfers were dealt with, necessary and essential to the Confirmed Plan.

Section 1146(c) cannot be "shrink wrapped" by restricting its application to cases which are factually indistinguishable from the few cases to which the exemption has so far been applied: bankruptcies by smaller debtors with one or two assets,[9] because this approach

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[9] In *In re Bel-Aire Investments*, 142 Bankr. 993, 994 (Bankr. M.D.Fla. 1992), transfers of at least six properties were exempted without objection.

ignores the history of the exemption. It has always been flexible, molded by courts to reach beyond a narrow, literalistic application so long as the transfer at issue served the goals of Chapter 11 and the exemption: facilitating reorganization and avoiding liquidation. The only cases that denied the exemption based on the circumstances of the transfers, rather than the type of tax involved, were ones between two nondebtors, in which the reorganizations could have proceeded even if the transfers at issue *had never occurred.* Those cases [10] all involved transfers from a non-debtor transferee to the debtor's (former) property to a third party lender (*Eastmet, Amsterdam* and *Bel-Aire*) or buyer (*Kerner*). As the court recognized in *Eastmet,* in those cases the debtors' plans could have been accomplished whether the buyer paid cash for the debtor's property, obtained an unsecured loan or took a mortgage. 907 F.2d at 1489. In stark contrast, NVR's plan could not have been confirmed or consummated without the transfers at issue. NVR's transfers must be exempted as they fit squarely within the intended scope of the § 1146(c) exemption.

2. There Is No Exception to 11 U.S.C. § 1146(c) For Transfers Made In The Ordinary Course Of Business

The Taxing Authorities, by focusing on the fact that NVR, as a homebuilder, made the transfers at issue in the course of its ordinary business as debtor-in-possession, seek to have this court do what it may not: create an exception found nowhere in § 1146(c), which

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[10] *In re Eastmet,* 907 F.2d 1487 (4th Cir. 1990); *In re Amsterdam Avenue Dev. Assocs.,* 103 Bankr. 454 (Bankr. S.D.N.Y. 1989); *In re Bel-Aire Invs,* 142 Bankr. 992 (Bankr. M.D.Fla. 1992); and *In re Kerner Printing Co.,* —— Bankr. ——, 1995 WL 64613 (Bankr. S.D.N.Y. 1995).

exception would prevent NVR from taking advantage of the § 1146(c) tax exemption if the transfers at issue were made in the ordinary course of its business. To further their attempt to create an "ordinary course of business" transfer exception, the Taxing Authorities make policy arguments which are properly directed to Congress rather than to this Court. Courts, including bankruptcy courts, have long deferred to legislative bodies when asked to create or imply statutory exceptions. For example, in *Davis v. Davis (In re Davis)*, 911 F.2d 560, 562 (11th Cir. 1990), the court refused to create an exception to § 727(a)(2)(A) of the Bankruptcy Code, which bars discharge where the debtor makes prepetition transfers with intent to hinder or defraud its creditors, for debtors who retransferred the property back before filing bankruptcy. The court justified its refusal to create an exception:

> Congress certainly was capable of drafting a statute which would deny a discharge only when assets were fraudulently transferred and remained transferred at the time of filing of bankruptcy proceedings, but it did not. We are a court and not a legislative body; therefore, we are not free to create by interpretation an exception in the statute which is plain on its face.

Id.

The Seventh Circuit likewise refused to create an exception to the bankruptcy trustees's avoiding powers, even though the exception proposed had been recognized by courts interpreting a predecessor provision, explaining:

> It is beyond our scope of review to consider the policy implications of permitting the debtor to set aside the foreclosure of his home. Any change deemed desirable on policy grounds should be addressed to Congress rather than to this court. Our

> duty is simply to interpret the language of the statute . . . [The interpretation proposed by appellant], in effect, creates an exception to the trustee's avoiding powers under Section 548(a)(2)(A)—an exception not otherwise found in the statute—for property sold at a foreclosure sale.

Bundles v. Baker, (In re Bundles), 856 F.2d 815, 823 (7th Cir. 1988); *see also Brady Dev. Co. v. Resolution Trust Corp.*, 14 F.3d 998, 1006 n.2 (4th Cir. 1994) (refusing to create an exception to the Financial Institutions Reform, Recovery and Enforcement Act because "Congress did not provide an exception to the requirement that claims be filed for administrative determination based on the length of time the prior litigation had been underway; therefore, this court will not create such an exception"); *Guidry v. Sheet Metal Workers Nat'l. Pension Fund,* 110 S.Ct. 680, 687 (1990) ("nor do we think it appropriate to approve any generalized equitable exception . . . to ERISA's prohibition on the assignment or alienation of pension benefits . . . .[The prohibition] reflects a considered congressional policy choice. . . . *If exceptions to this policy are to be made, it is for Congress to undertake that task*") (emphasis added).

Indeed, a court interpreting the very statutory provision at issue in this case refused to create an exception to prevent solvent debtors from benefitting from the tax exemption:

> The plain language of § 1146(c), in referring to all plans, makes no differentiation between solvent and insolvent debtors. *Had Congress,* in its near decade long substantial overhaul of the bankruptcy system, *sought to limit the exemption* to insolvent debtors,

> *it surely would have found the words to express such an intent.*

In re Amsterdam Avenue Dev. Assocs., 103 Bankr. 454, 458-59 (Bankr. S.D.N.Y. 1989) (emphasis added).

The Taxing Authorities' argument for an "ordinary course of business" exception to the § 1146(c) exemption also proves too much. Their argument would make subject to tax *all* transfers which occurred in the ordinary course of a debtor's business. However, if NVR had been able to convince the Bank Group in 1992 to allow it to lengthen the payment periods on its bank debt, and thus had created a plan under which *all* payments to creditors were funded by its post-petition home sales, those transfers would be made in the ordinary course of business yet would fit even the Taxing Authorities' narrow understanding of transfers "under a plan." But the Taxing Authorities make no allowance in their argument for an ordinary course exception which would exempt such transfers. There is simply no support for the Taxing Authorities' attempt to create an "ordinary course of business" exception to § 1146(c).

In the words of House Report 8046, *supra*, the purpose of the statute, and its predecessors, was the preserving [of] a business enterprise so that it could be "economically productive [and] also productive of future normal taxes." Because NVR made the transfers at issue here, it paid its creditors, saved the company, and, since September, 1993 has paid millions of dollars in transfer and recordation taxes to the States of Maryland and Pennsylvania. The transfers were necessary to every stage of NVR's progression through the Chapter 11 and to its ultimate emergence as a viable entity in which the public invested $160 million. In sum, the transfers made to and by NVR

from April 6, 1992 through September 30, 1993, were essential to the formulation, the confirmation, and the consummation of NVR's Confirmed Plan. The Court holds that they were transfers made "under a plan confirmed" and therefore exempt from state transfer and recordation taxes under 11 U.S.C. § 1146(c).

* * * *

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eleventh Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title 11, United States Code

§ 106 Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money re-

covery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

§ 1146 Special tax provisions

(c) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

Supreme Court, U.S.
FILED
1999
CLERK

(2)

No. 99-792

IN THE
Supreme Court of the United States

NVR HOMES, INC.,

Petitioner,

v.

CLERK OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals correctly hold that the Eleventh Amendment barred the federal bankruptcy court in this case from issuing declaratory relief that would require the States of Maryland and Pennsylvania to refund real property transfer and recordation taxes?

2. Did the court properly interpret the tax exemption under 11 U.S.C. 1146(c) as applying only to those instruments of transfer made or delivered after confirmation of a reorganization plan and that are necessary to consummation of the plan?

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STATEMENT OF THE CASE

This case was triggered by the refusal of the States of Maryland and Pennsylvania to refund to petitioner NVR Homes, Inc. ("NVR") certain transfer and recordation taxes that were paid in connection with transfers of real property made by NVR's predecessors when they were debtors in bankruptcy. While the States of Virginia, New York, Delaware, and North Carolina refunded to NVR the taxes that those States had previously collected, taxing authorities in Maryland and Pennsylvania refused to do so because they disputed NVR's contention that the transfers were non-taxable under 11 U.S.C. § 1146(c). (App. 44a.) That section provides that "the making or delivery of an instrument of transfer under a plan [of reorganization] confirmed under § 1129 . . . may not be taxed under any law imposing a stamp tax or similar tax."

Claiming that its transfers were exempt from taxation because they were made under a plan of reorganization confirmed by the bankruptcy court two years before, NVR initiated a contested matter by filing a motion in the United States Bankruptcy Court for the Eastern District of Virginia under Rule 9014 of the Federal Rules of Bankruptcy Procedure. That motion sought a declaration that § 1146(c) exempted from taxation the real property transfers that NVR made from the time it filed for bankruptcy until the time its reorganization plan was confirmed.

The bankruptcy court initially granted NVR's motion for declaratory judgment (App. 100a), but subsequently amended its judgment to provide that while § 1146(c) exempted the transfers from local taxes, the Eleventh Amendment prohibited the judgment from binding Maryland or Pennsylvania as collectors of state transfer taxes. (App. 99a.) After finding that there was a justiciable controversy because the state and local taxing authorities in Maryland and Pennsylvania had refused or failed to refund previously paid recording taxes (App. 101a), the court stated that (1) NVR's request for declaratory relief "addressed no threat of any future violation" (App. 78a), and so (2) NVR's "only purpose in seeking relief of a 'declaratory' nature,

then, must have been to obtain an order which could act as res judicata in some later proceeding to actually recover the monies." (App. 78-79a). The bankruptcy court held that the Eleventh Amendment barred NVR's action seeking a declaratory judgment to be used in state court proceedings to obtain tax refunds because the effect of such a judgment was the same as an award of damages or restitution. (App. 79a.)

The court also held that the real property transfers were exempt from local taxes under 11 U.S.C. § 1146(c). Adopting the findings of fact and conclusions of law submitted by NVR (App. 100a n.1), the court found that while "[t]he *sine qua non* of the Confirmed Plan was a $160 million public offering of ten-year Notes" (App. 115a), the success of the public offering was predicated upon NVR's "ability to remain in business in the ordinary course during the Chapter 11 period." (*Id.*) Based on these findings, the court concluded that the transfers "were exempt from transfer and recordation taxes" (App. 102a) because "the transfers were dealt with, necessary and essential to the Confirmed Plan." (App.115a.)

On appeal, the district court held that the relief sought by NVR's motion was not barred by the Eleventh Amendment and that the transfers at issue were exempt from taxation under § 1146(c). (App. 53a.) Finding that this proceeding was not a "suit" for Eleventh Amendment purposes, the district court stated that "NVR's motion requested that the bankruptcy court, pursuant to its retained jurisdiction over the plan, enter an order clarifying the intended coverage of the Plan's exemption provision." (App. 51a.) The court held that the Eleventh Amendment "was no obstacle to the bankruptcy court's power to declare . . . certain real property transfers exempt from taxation under § 1146(c) and the Plan." (App. 52a.) The district court declined to decide, however, whether the bankruptcy court's declaratory judgment "is binding in any way" on Maryland or Pennsylvania. (App. 53a.). The court also held that the transfers at issue were tax-exempt because they

"enabled NVR to remain a viable operation and avoid liquidation." (App. 49a.)

The court of appeals reversed the district court's decision on the Eleventh Amendment immunity issue and vacated its decision on the tax exemption as applied to the State taxing authorities.[1] (App. 30a.) The court rejected the district court's determination that NVR did not seek any money from the States but rather sought only "a federal interpretation of § 1146(c)," stating if that were so it would render the court's decision "advisory and beyond a federal court's Article III power." (App. 22a.) Finding that NVR was not seeking an advisory decision, the court stated that "the substance of NVR's motion demands affirmative action by Maryland and Pennsylvania" in the form of a tax refund "payment from the Maryland and Pennsylvania treasuries." (App. 20a.) Citing this Court's decisions in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48-49 (1994), and *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945), the court held that such relief was barred because "an action leading to an order forcing a payment to citizens is the quintessential 'suit' under the Eleventh Amendment." (App. 21a.)

On the tax exemption issue as it affected local taxing authorities, the court of appeals reversed the district court judgment to the extent it held that § 1146(c) applies to transfers occurring prior to the confirmation of NVR's reorganization plan, but affirmed the district court's judgment to the extent it covers transfers occurring after the plan was confirmed. (App. 30a.) The court of appeals subsequently denied NVR's Petition for Rehearing and Suggestion for Rehearing en banc and respondents' Petition for Rehearing.

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[1] The court of appeals considered the State taxing authorities to be the Maryland circuit court clerks as collectors of state taxes and the Department of Revenue of the Commonwealth of Pennsylvania. (App. 7a.)

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH ELEVENTH AMENDMENT DECISIONS OF THIS COURT AND OTHER COURTS.

Further review of this case is unwarranted because the first issue raised in the petition was not argued in either the court of appeals or the district court, and the remaining questions have been resolved in a manner that conforms with prior decisions of this Court and similar decisions of other federal courts.

Contrary to NVR's assertion that "[t]his case provides the Court with an opportunity to resolve the constitutional validity of 11 U.S.C. § 106(a)," Pet. at 12, that issue has not been preserved for review. While the bankruptcy court held that the abrogation of immunity set forth in § 106(a) was unconstitutional, NVR did not challenge that holding in the district court or the court of appeals. NVR offers no reason why this Court should depart from its usual rule of not deciding "questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citations omitted) (brackets in original). *See also Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994); *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986).

Nor is review warranted to address the Eleventh Amendment issue that the court of appeals did decide because the court applied well-settled principles in determining that the Eleventh Amendment bars the relief that NVR seeks. Relying on *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945), and *In re State of New York*, 256 U.S. 490, 500 (1921), the court of appeals stated that it must "consider both the procedural posture and substantive nature of the proceeding" (App. 14a) in determining the applicability of the Eleventh Amendment in this case. The court committed no error worthy of this

Court's review in examining "the essential nature and effect of the proceeding," *Ford Motor Co.*, 323 U.S. at 464, and concluding this is a classic case in which the Eleventh Amendment applies because NVR "sought a determination that the states owed NVR money – repayment of exempt transfer and recordation taxes – and a favorable decision would require that a federal court raid Maryland's and Pennsylvania's treasuries." (App. 22a.)

While NVR contends that it merely sought "a declaration from the bankruptcy court about the meaning and scope of the Joint Plan, its order of confirmation, and the federal bankruptcy statute," Pet. at 21, the court of appeals agreed with respondents that, if this was truly all that NVR requested, such a declaration "would be advisory and improper" because "the federal court action could not result in ordering the states to return the tax payments." (App. 19a-20a.) Despite its denials, NVR seeks an order requiring Maryland and Pennsylvania to provide tax refunds. Indeed, in concluding that NVR's motion is in essence an action seeking the recovery of money paid to those States, which is a remedy that this Court has held time and again is barred by the Eleventh Amendment, *see, e.g., Edelman v. Jordan*, 415 U.S. 651, 668-69 (1974); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. at 463-64, the court of appeals determined that, "absent the ability of the bankruptcy court to exercise jurisdiction over the states and compel the turnover of the tax payments, no remedy effectively could be granted." (App. 20a.)

This determination gives rise to no exceptional question of law. Rather, it is entirely consistent with this Court's observation that if a party "would make no claim that the federal declaratory judgment was res judicata in later commenced state proceedings, the declaratory judgment would serve no purpose whatever in resolving the remaining dispute between the parties, and is unavailable for that reason." *Green v. Mansour*, 474 U.S. 64, 73 n.2 (1985). Anticipating this language, NVR asserts that "a state court would be required to treat the bankruptcy court's declaration

as the final word on the meaning of the Joint Plan." Pet. at 21. But as the court of appeals found, even if the bankruptcy court's "decision would act only as res judicata in a later state court or state administrative proceeding, then the issuance of the judgment would still be improper." (App. 22a n.5.) Addressing a similar request for declaratory relief, this Court in *Green v. Mansour* stated that a declaratory judgment "would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed." 474 U.S. at 73. Even that type of relief would be inappropriate, however, because "the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment." *Id.*

The court of appeals' decision is thus completely in accord with these statements, as it is with decisions of other federal courts. While NVR claims that a number of courts have reached "conflicting results" (Pet. at 15) on the Eleventh Amendment issue raised here, NVR does not cite a single bankruptcy case in which a court has held that the Eleventh Amendment is inapplicable to an order that would require a State to refund taxes or other monies. All of the cases that have addressed this issue have held to the contrary. *See, e.g., Bakst v. New Jersey* (*In re Ross*), 234 B.R. 199, 203 (Bankr. S.D. Fla. 1999) ("[I]f this Court were to determine the extent of the Debtors' or the estate's tax liability, it effectively would be entering a money judgment against New Jersey, thus violating the Eleventh Amendment."); *Mitchell v. California Franchise Tax Board* (*In re Mitchell*), 222 B.R. 877, 885 (B.A.P. 9th Cir. 1998) ("Declaratory relief could result in an order having res judicata effect in a later proceeding to recover damages."). *See also United States v. Nebraska* (*In re Doiel*), 228 B.R.

439, 441 n.1 (D.S.D. 1998).

While NVR distinguishes these cases because they are adversary proceedings, Pet. at 15-16 and n.12, the court of appeals in this case correctly recognized that the immunity issue is the same whether it arises in such a proceeding or, as here, in a proceeding initiated by a Rule 9014 motion. That rule explicitly refers to the focus of such a proceeding as a "contested matter" and requires that "relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." The court of appeals found that such a contested matter "is unlike an administrative matter in bankruptcy because 'there are (at least) two parties who are opposing each other with respect to relief sought by one of them.'" (App. 19a) (quoting 10 *Collier on Bankruptcy* ¶ 9014.01 (Lawrence P. King ed., 15th ed. 1999)). Fundamental immunity principles are triggered when the resolution of such a dispute results in the type of affirmative relief against a State that NVR seeks in this case.

Rather than cite any authority to support the rather remarkable proposition that the States are not immune in these circumstances, NVR instead relies on cases involving altogether different issues, such as whether the Eleventh Amendment prohibits a bankruptcy court from (1) determining the dischargeability of debts owed a State, *see Virginia v. Collins* (*In re Collins*), 173 F.3d 924 (4th Cir.), *pet. for cert. filed*, 68 U.S.L.W. 3153 (U.S. Aug. 31, 1999) (No. 99-380); *Texas v. Walker*, 142 F.3d 813 (5th Cir.1998), *cert. denied*, 119 S.Ct. 865 (1999); *Phelps v. Sallie Mae Loan Service Center* (*In re Phelps*), 237 B.R. 527 (Bankr. D.R.I. 1999), (2) adjudicating a proof of claim filed by a State against a debtor, *see In re Barrett Refining Corp.*, 221 B.R. 795 (Bankr. W.D.Okla. 1998), (3) deciding a debtor's liability to pay taxes, as opposed to a State's liability to refund taxes, when the debtor "in no way sought the entry of a money judgment against the State," *Smith v. Psychiatric Hospitals of Fla., Inc.* (*In re Psychiatric Hospitals of Fla., Inc.*), 216 B.R. 660, 661 (M.D.Fla. 1998),

or (4) adjudicating the tax-exempt status of real property transfers in an action brought by a State to collect unpaid transfer taxes from a trust created in bankruptcy. *See Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777 (4th Cir.1997). None of these cases involves any attempt to secure a federal court order requiring a State to pay funds out its treasury to a debtor or another party.

While Maryland and Pennsylvania joined an amicus brief urging this Court to review the decision in *Virginia v. Collins*, No. 99-380, the Eleventh Amendment issue in that case arises, as NVR acknowledges, in a "different procedural setting." Pet. at 17. The question addressed in *Collins* is whether the court of appeals erred in holding that the Eleventh Amendment does not prohibit a bankruptcy court from determining the dischargeability of a debt owed to a State. No need for further review exists in this case, however, because both this Court and the lower federal courts have uniformly held that, subject to exceptions that are inapplicable here, the Eleventh Amendment bars any effort to recover money from the States.

II. THE DECISION BELOW IS CONSISTENT WITH SECTION 1146(c) AND DECISIONS OF OTHER COURTS OF APPEALS.

The petition also raises no substantial question concerning the applicability of the § 1146(c) exemption because the court of appeals correctly interpreted that exemption and did so in a manner that is consistent with the one circuit court decision as to which NVR claims a conflict. Relying on this Court's decision in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989), the court of appeals noted that tax exemptions are to be narrowly construed in favor of the States (App. 28a), and applied the plain meaning rule set forth in *Perrin v. United States*, 444 U.S. 37, 42 (1979), to conclude that a transfer cannot be "under a plan confirmed" if the transfer pre-dates confirmation of the plan. (App. 28a-29a.) While the concurring judge disagreed with the majority's analysis

under the plain meaning rule, he agreed with its conclusion by relying on the rule for strict construction of tax exemptions, and finding that Congress has not clearly expressed an intention to have the exemption apply to transfers made during the pre-confirmation period. (App. 32a.)

Contrary to NVR's assertion, the decision below does not conflict with *City of New York v. Jacoby-Bender, Inc.* (*In re Jacoby-Bender, Inc.*), 758 F.2d 840 (2nd Cir.1985). As the bankruptcy court in that case stated, the transfer in dispute occurred after confirmation of the plan. *See In re Jacoby-Bender, Inc.*, 40 B.R. 10, 11-12 (E.D.N.Y. 1984). The issue there involved the sale of property and delivery of a deed that were authorized by a separate order of the bankruptcy court, but were not specifically authorized in the confirmed plan. The Second Circuit found the absence of specific authorization in the plan to be irrelevant. In holding that the delivery of the deed was "'under' the plan within the meaning of section 1146(c)," the court found the determinative factor to be that "'the plan's consummation depended almost entirely upon the sale of the building,' the sale in turn depending upon the delivery of the deed." 758 F.2d at 841.

Rather than reject the court's views in *Jacoby-Bender*, the court of appeals below expressly stated that it did "not take issue with the Second Circuit's logic . . . ." (App. 25a.) The court simply pointed out that *Jacoby-Bender* does not address the issue that the court of appeals in this case resolved. As the court aptly noted, unlike this case, "*Jacoby-Bender* did not deal with a preconfirmation transfer, but a postconfirmation transfer that, although not *specifically* authorized by the plan, was clearly necessary to the confirmed plan's *consummation*." (App. 25a) (emphases in original). "The succinct issue presented was thus whether the confirmed reorganization plan encompassed the property sale, thereby making it part of a 'plan confirmed' under § 1146(c)." (*Id.*) In contrast, the court below observed that "[t]he relatively straightforward issue before us is . . .

whether preconfirmation transfers are 'under a plan confirmed.'" (App. 28a.) Stating that § 1146(c) exempts only transfers made under a "plan confirmed," the court of appeals found "fundamentally flawed" the proposition that "every transfer 'essential' to a plan's *confirmation* is by definition 'under a plan confirmed'. . . ." (App. 27a) (emphasis in original). Applying dictionary definitions of the word "under," the court stated that it "cannot say that a transfer made prior to the date of plan confirmation could be subordinate to, or authorized by, something that did not exist at the date of transfer – a plan confirmed by the court." (App. 29a.) The court of appeals thus concluded that "Congress, by its plain language, intended to provide exemptions only to those transfers reviewed and confirmed by the court." (App. 30a.)

The court's interpretation of § 1146(c) is consistent with the language of the statute and does not generate the circuit court conflict that NVR claims to exist. Indeed, while NVR's purchases and sales of real property may have been essential to its continued viability as a homebuilding business and its ability to formulate and obtain confirmation of its reorganization plan, these transactions did not involve instruments of transfer necessary to execute or consummate the plan. Although NVR asserts that these transfers, both before and after confirmation, were "in accordance with" the plan, the only plan provision it points to as support for this assertion is the provision incorporating the § 1146(c) exemption. *See* Pet. at 28. NVR cites no provision of the confirmed plan in which these transfers are either specifically referenced or implicitly included in a general outline of the activities that are to occur to consummate the plan. The court of appeals committed no error, therefore, in reaching the conclusion that it did.

In sum, the petition fails to identify any issue on which the lower federal courts require this Court's guidance. The petition should be denied, therefore, because this case presents no question warranting the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons stated, the petition should be denied.

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December 8, 1999

Supreme Court, U.S.
FILED
DEC 16 1999
CLERK

No. 99-792

IN THE
Supreme Court of the United States

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v.

CLERKS OF THE CIRCUIT COURTS FOR ANNE ARUNDEL COUNTY, MARYLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Respondents' Brief in Opposition ("Opp.") fails to confront the questions presented by the Petition. One reading the brief without reference to the Petition would hardly know that the first question presented is whether NVR's effort to gain a declaration as to the meaning of its bankruptcy plan constituted a "suit" against the states within the meaning of the Eleventh Amendment. Nor would it be clear that NVR did not initiate an adversary proceeding and sought no money judgment from the states. Only by attempting to change the way this case comes to the Court can respondents undermine the demonstration in the Petition that review is warranted. Focusing on the

actual facts and questions presented confirms that the important and recurring issues raised by the Petition merit review.

ARGUMENT

1. Respondents' primary contention is that "the first issue raised in the petition" was not argued below. Opp. 4. It is quite clear, however, that the first question presented —involving which bankruptcy proceedings constitute "suit[s] * ** * against one of the United States" within the meaning of the Eleventh Amendment, *see* Pet. i—was both raised and resolved in the courts below. *See, e.g.*, Pet. App. 17a ("we are left to decide whether the case before us is a suit against the state tax authorities"); Pet. App. 40a (question presented in district court is "whether debtor's initiation of a contested matter * * * constituted a 'suit' for Eleventh Amendment purposes"). Respondents' waiver claim rests on a misstatement of the question presented. While we did observe that this case provides the Court with an opportunity to consider the constitutionality of 11 U.S.C. § 106(a), we urged the Court to grant review of "a preliminary question independently meriting this Court's review"—the "suit" question. Pet. 14-15. That question was both pressed and passed upon in the courts below.[1]

2. When respondents turn to the question that was presented by the Petition, they simply repeat the mischaracterization of NVR's action on which the Fourth Circuit decision rested. As we explained, *see* Pet. 21,

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[1] Contrary to respondents' contention, moreover, this Court may use this case as the vehicle to decide the constitutionality of 11 U.S.C. § 106(a) if it so chooses. That issue *was* "resolved in the lower court," *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citation omitted), when the Fourth Circuit relied on its earlier decisions holding that § 106(a) was unconstitutional. *See* Pet. App. 13a.

nothing in NVR's motion asked the bankruptcy court to " 'raid Maryland's and Pennsylvania's treasuries.' " Opp. 5 (quoting Pet. App. 22a). Had NVR pursued such an action in federal court—through, for example, an adversary proceeding asking the court to order a refund—the cases on which respondents rely might well be relevant. *See, e.g., Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974) (decree which "requires payment of state funds * * * as a form of compensation" invalid under Eleventh Amendment). Thus, it is not at all surprising that "NVR does not cite a single bankruptcy case in which a court has held that the Eleventh Amendment is inapplicable to an order that would require a State to refund taxes or other monies," Opp. 6, or that the cases on which NVR does rely did not involve "attempt[s] to secure a federal court order requiring a State to pay funds out [of] its treasury to a debtor or another party." *Id.* at 8. NVR sought no such order from the bankruptcy court below.

Instead, NVR sought a declaration from the bankruptcy court about the meaning and scope of the bankruptcy plan of reorganization. Relying on *Green v. Mansour*, 474 U.S. 64 (1985), respondents assert that such declaratory relief would either be meaningless or, if not meaningless, invalid under the Eleventh Amendment. This argument presents a false dichotomy, and ignores the context in which the question arises. The issue in *Green*, and in the cases on which it relied, was whether an independent declaratory judgment action could be maintained when its only effect would be to require payment of funds from the state treasury. *See id.* at 73. Here, by contrast, the "suit" issue arises not where a federal court is being asked to consider a free-standing declaratory judgment action but rather is exercising its well-established power to interpret its own decrees and orders. *See Local Loan Co.* v. *Hunt*, 292 U.S. 234, 239-240 (1934). And it is not

at all clear that its interpretation—if it adopted NVR's view of the plan—would, as was the case in *Green*, "leav[e] to the state courts only a form of accounting proceeding whereby damages or restitution would be computed." 474 U.S. at 73. On the contrary, the states would retain all defenses to the refund actions that they would otherwise have, but would be bound to honor the federal bankruptcy court's interpretation of its own decree. The declaration sought by NVR is therefore neither meaningless nor the final word on refunds, but simply an exercise of the federal court's power to construe its own decrees.

3. While respondents voluntarily appeared in the proceedings below in an attempt to secure a favorable interpretation of the bankruptcy decrees, the proceeding NVR initiated involved no process issued to the states or coercion of state entities to appear. *See* Pet. App. 19a. As we observed in the Petition, Pet. 20-21, "the very object and purpose" of the Eleventh Amendment was to preclude coercive actions against the states in federal court, *see In re Ayers*, 123 U.S. 443, 505 (1887)—an issue that is simply not presented here. Rather than provide an answer to this fundamental deficiency of their Eleventh Amendment defense, respondents simply choose to ignore "the very object and purpose" of the provision on which they rely. Nothing in the Opposition comes to grips with the absence of coercion, or deals with the demonstrated conflict among the lower courts on whether proceedings that are not coercive actions against the states constitute a "suit * * * against one of the United States" under the Eleventh Amendment. *See* Pet. 15-20.

The absence of coercion was found to be significant on the "suit" question in the bankruptcy context in *Virginia* v. *Collins (In re Collins)*, 173 F.3d 924 (4th Cir. 1999),

pet. for cert. filed, 68 U.S.L.W. 3153 (U.S. Aug. 31, 1999) (No. 99-380). As the United States has recognized in its Brief in Opposition in *Collins* (filed Dec. 1, 1999), the proceeding at issue there "had none of the characteristics of a suit against a State, and the Eleventh Amendment * * * was not implicated" because the state, although "served with a copy of respondents' motion, * * * was not named as a defendant, was not served with process, and was not compelled to appear in bankruptcy court." Brief for the United States in Opposition at 4, 5. *See also id.* at 5 (citing *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58 (1996)); *New York* v. *Irving Trust Co.*, 288 U.S. 329, 333 (1933) (quoted at Pet. 22). So too here. Yet the Fourth Circuit reached a completely different result below, contrary not only to its own earlier decisions but also to many other decisions—such as *Texas* v. *Walker*, 142 F.3d 813 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999)—finding that bankruptcy proceedings short of adversary proceedings do *not* constitute suits against the states under the Eleventh Amendment. *See* Pet. 16-19.

4. Respondents attempt to dismiss their own support for this Court's review of the "suit" question in *Collins* by suggesting that "NVR acknowledges" that the *Collins* case arises in a "different procedural setting." Opp. 8 (quoting Pet. 17). What NVR in fact said in explaining the Fourth Circuit's Eleventh Amendment decisions, Pet. 16-17, is that *Collins* arose "in a slightly different procedural setting" from the Fourth Circuit's earlier cases. That is hardly the "acknowledge[ment]" respondents would have it be; indeed, the state petitioner in *Collins* itself recognizes that the cases "raise[] the identical issue." Reply Brief of the Petitioner in *Collins*, at 4 (filed Dec. 14, 1999). In any event, the "suit" issue presented in *Collins* and in this case cannot be dismissed by fine dissection of

the variety of procedural postures in which it might arise. Instead, as the respondent-supported petition in *Collins* acknowledged, there is "continuing confusion over the scope of the application of the Eleventh Amendment to bankruptcy" which "serves the interests of no one." *Collins* Pet. 23. While that confusion does arise in a variety of procedural settings, this Court's explication of the factors to be considered when resolving the "suit" question in the bankruptcy context would eliminate confusion across the board.

5. With respect to the second question presented, respondents contend that the decision below does not conflict with the Second Circuit's decision in *City of New York* v. *Jacoby-Bender, Inc. (In re Jacoby-Bender, Inc.)*, 758 F.2d 840 (2d Cir. 1985), because the transfer in that case occurred after the confirmation of the plan. Opp. 9. As we explained, however, the *Jacoby-Bender* court held that a transfer is "under a plan confirmed" where—as here—it is "necessary to the consummation of a plan." 758 F.2d at 841. *See* Pet. 24-25. Respondents have nothing to say about the numerous lower court decisions applying the *Jacoby-Bender* test and holding *pre*-confirmation transfers exempt under § 1146(c), because they were "necessary to the consummation of a plan," or the conflict the Fourth Circuit's decision creates with those decisions. *See* Pet. 24, 26-27.

Respondents also contend (Opp. 9) that the Fourth Circuit did not reject *Jacoby-Bender* because the court stated that it did not "take issue with the Second Circuit's logic." Pet. App. 25a. But, as we explained, the *Jacoby-Bender* test applies just as readily to the facts of this case as it did to those before the Second Circuit. Pet. 26. Nevertheless, the Fourth Circuit determined that it would not apply that test as bankruptcy courts throughout the

Second Circuit and elsewhere have applied it. Pet. App. 26a; *see* Pet. 25-27. That conflict warrants this Court's review.

6. In attempting to defend the Fourth Circuit's interpretation of § 1146(c), respondents merely track the Fourth Circuit's misguided reasoning. Opp. 10. We explained why the Fourth Circuit's interpretation was flawed, and that—under the correct reading of the statute—the transfers at issue were clearly made "under a plan confirmed." Pet. 27-29. Respondents say nothing about the bankruptcy policy served by that reading or the support it finds in the legislative history of the exemption. *See* Pet. 28-29.

7. Respondents also suggest that the transfers at issue cannot have been made "under a plan confirmed" because the plan contains no reference to them. Opp. 10. As the Second Circuit explained in *Jacoby-Bender,* however, "[t]hat the plan did not empower the debtor to make a specific sale or deliver a specific deed is *irrelevant* to [a] determination that the delivery of the deed took place 'under' the plan within the meaning of section 1146(c)." 758 F.2d at 841 (emphasis added). Respondents' suggestion thus simply highlights the conflict between the decision below and *Jacoby-Bender.*

8. Respondents do not contend that the issues are not important or recurring, and no such contention would be plausible. As the Petition demonstrates, multiple proceedings in bankruptcy courts implicate the questions of what constitutes a "suit" within the meaning of the Eleventh Amendment and the proper interpretation of 11 U.S.C. § 1146(c). These questions merit this Court's review.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

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